

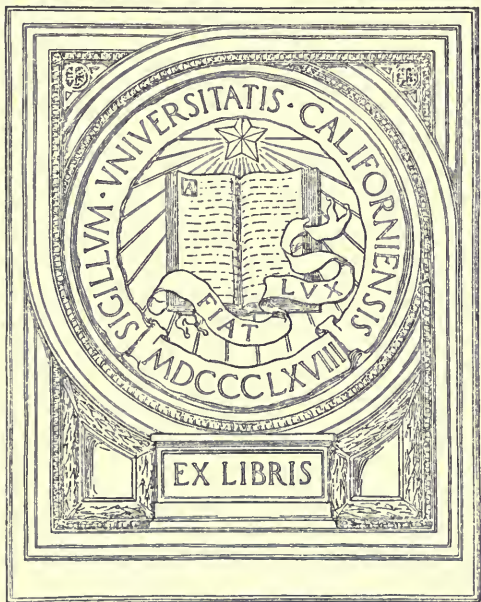
CLASSICS OF THE BAR



VOLUME III

ALVIN V
SELLERS

UNIVERSITY OF CALIFORNIA
AT LOS ANGELES



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MAY TREAT MORRISON
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CLASSICS OF THE BAR





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THE JUSTICES OF THE U. S. SUPREME COURT AT THE DAWN OF ITS HISTORY

The Original Supreme Court

"The ink" was still wet upon the signature of President Washington to the judiciary act of 1789 when he presented to the Senate the following names: For Chief Justice John Jay, for Associate Justices: John Rutledge, James Wilson, William Cushing, Robert H. Harrison, and John Blair. On the 26th of September the appointments were confirmed. . . .

"We are inspired by his long and distinguished Chief Justiceship to the various offices to which he has been called for the future by his talents could be used to the benefit of the people."

THE Supreme Court of the United States is not only a most interesting, but a virtually unique creation of the founders of the Constitution. The success of this experiment has blinded men to its novelty. There is no exact precedent for it, either in the ancient or modern world.

jewel in the sacred treasures of national reputation, and with the spotless ermine of the just and noble Sir Henry Sumner Maine.

clearness and force and command— with extreme elegance of expression. . . . His soundness of judgment, unblemished character, and sound views on public questions, commended him to the government of Washington as the publicist and jurist best fitted to interpret and adorn the judiciary of the nation, and to preside over the deliberations of the supreme tribunal."

John Rutledge was an able and eloquent member of the South Carolina bar. He had served as a judge of the court of chancery. His legal learning is said to have been great. In 1775 he became a member of the First Continental Congress, and Patrick Henry called him the foremost orator of that body. As Commissioner in Chief of his native State, he wrote to General Moultrie, who commanded Sullivan's Island, in the harbor of Charleston, the famous note: "General Lee wishes you to evacuate the fort. You will not without

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"We are assured by his son that Jay preferred the Chief Justiceship to the various offices tendered him, as the sphere in which for the future his talents could be most usefully exerted. . . . He was neither a brilliant advocate nor a profoundly learned lawyer nor a master of the technique of practice. His public duties had been too exacting to permit him to labor in the forum. He was rather a statesman and a jurist than a pleader of causes, but his character was 'a jewel in the sacred treasures of national reputation, and when the spotless ermine of the judicial robe fell upon him, it touched nothing not as spotless as itself'. . . . He wrote at all times with great clearness and force and occasionally with extreme elegance of expression. . . . His calmness of temperament, accuracy of judgment, unblemished character, and sound views upon public questions, commended him to the sagacious choice of Washington as the publicist and jurist best fitted to elevate and adorn the judiciary of the nation, and to preside over the deliberations of its supreme tribunal."

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an order from me. I would sooner cut off my hand than write one." He was one of the most active of the Southern members of the Federal Convention.

William Cushing, of Massachusetts, had "succeeded his father as a judge of the Supreme Judicial Court, and, at the outbreak of the Revolution, alone of all those high in office supported the rights of his country. He became the first Chief Justice of Massachusetts under the Constitution of 1780, an office which he held at the time of his promotion to the Supreme Court of the United States."

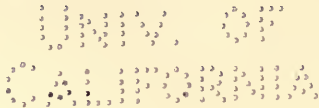
"James Wilson was in some respects the ablest member of the first Supreme Court. He stood in the very foremost rank at the bar. . . . He was one of the signers of the Declaration. . . . His attainments in the classics were remarkable. . . . In the principles of finance and constitutional law as it then existed, he was particularly learned. As an orator he held high rank both as an advocate and a parliamentary debater. He was one of the ablest and most active members of the Federal Convention."

John Blair had attained eminence at the Virginia bar. "In 1766 he became a member of the House of Burgesses, and ten years later was one of the committee of the Convention which drew up a plan for the government of the State. In 1779 he was made Chief Justice of the General Court, and later was appointed a member of the High Court of Chancery, and by virtue of both stations was a judge of the first Court of Appeals. He served as a member of the Federal Convention as well as of his State Convention, and was a firm supporter of the Constitution. He was regarded by his contemporaries as an able man, amiable in disposition, blameless and pious, possessed of great benevolence and goodness of heart."

Robert H. Harrison had been General Washington's secretary and a member of his military family from 1776-1781. Five days after his confirmation as an Associate Justice of the Supreme Court of the United States, he was unanimously chosen Chancellor of Maryland. After some hesitation he determined to accept the latter position. James Iredell was appointed in his place. He had attained distinction at the bar of North Carolina and had been Attorney General, and Judge of the District Court. He ably advocated a ratification of the Constitution. He had just completed his labors as commissioner to revise the laws of his adopted State, when he was appointed to the vacant position in the Supreme Court of the United States.—From Hon. Hampton L. Carson's *History of the Supreme Court of the United States*.

CLASSICS OF THE BAR

STORIES OF THE WORLD'S GREAT LEGAL
TRIALS AND A COMPILATION OF
FORENSIC MASTERPIECES



BY

ALVIN V. SELLERS

VOLUME THREE

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Classics of the Bar

A Tragedy of the Seas

ONE of the most remarkable cases known to the jurisprudence of any nation was the trial of Alexander William Holmes, at the April term of the Circuit Court of the United States, held at Philadelphia, in 1842.

It appeared from the evidence that Holmes was a member of the crew of the good ship, *William Brown*, which left Liverpool, March 13, 1841, bound for Philadelphia.

On Monday night, April 19th, the vessel struck an iceberg off the coast of Newfoundland, and began to sink. The lifeboats were launched, but—even as it was in that later hour of human history when the ill-fated *Titanic* went to the bottom of the sea and broke the heart of the world—the lifeboats were few; and, although there were on board only sixty-five passengers, thirty-one went down with the sinking ship. The others were transferred to the two small boats that were launched.

The first mate, eight seamen and thirty-two passengers crowded into the larger of the two boats; the captain, second mate, six seamen and one passenger entered the other.

These two boats remained close to each other for some time after the vessel sank; but, on Tuesday morning, they separated. The captain, who was in the smaller one, directed the seamen in the other boat to obey the orders of the mate as they would his own.

The mate told the captain before the boats separated that his boat was unmanageable, was much too crowded, and that it would in all probability be necessary to cast lots and throw some overboard. The captain replied: "I know what you'll have to do. Don't speak of that now; let it be the last resort."

In a short while the larger boat began to leak. Late Tuesday night the mate, who had been bailing incessantly, saw that all efforts to keep the boat from sinking were proving fruitless, and he exclaimed: "This work won't do. Help me, God. Men, go to work."

It was a *dreadful* "work" the mate had in mind—the throwing of some of the passengers overboard that the others might be saved.

There was no response to this cold order of death except the melancholy moaning of a sorrowful sea.

A Tragedy of the Seas

Soon, one of the passengers exclaimed: "The boat is sinking. The plug is out. God have mercy on our poor souls."

The mate again cried to his men: "Men, you *must* go to work or we shall all perish. Do not throw over any woman and do not separate man and wife."

Alexander William Holmes was a member of the crew. He had helped many passengers into the smaller boats and had been the very last to leave the sinking ship. Just before it sank he had risked his life in a moment of extreme danger to climb up the big ship's side and rescue for a distracted mother a sick and helpless child that had been left behind. He had given his clothing to protect the women who were shivering in the frozen sea. More than once he had proved a brave, gallant seaman.

When the orders came from the mate, Holmes felt in honor bound to carry them out. He had followed the sea from his youth and knew not except to obey the commands of his superior. Such was his conception of a sailor's duty.

And on that sad, eventful day, in the tragical path where he thought his duty lay, his step was firm.

After three men had been thrown overboard, Holmes came to Francis Askin, who offered him five sovereigns to spare his life. Holmes replied, "I don't

want your money, Frank"; and, after a violent struggle which nearly sank the boat, Holmes cast him into the sea.

Two sisters of Askin were also drowned, but it is not known whether they were thrown over by some member of the crew, or whether they voluntarily chose to die after seeing their brother drown.

Fourteen men in all were thrown overboard.

Both of the smaller boats were later picked up by passing ships and reached land in safety.

Holmes was indicted for homicide, charged with the drowning of Francis Askin. The indictment was based on the Act of Congress of April 30, 1790, which provides that if any seaman shall commit manslaughter upon the high seas, he shall be imprisoned not exceeding three years and fined not exceeding one thousand dollars.

The trial began on April 13, 1842.

The Government was represented by District Attorney William M. Meredith, Oliver Hopkinson, and George M. Dallas. Holmes was represented by David Paul Brown, Edward Armstrong, and Isaac Hazlehurst.

The defense invoked the well-known maxim that self-preservation is the first law of nature. The illustration was given of two persons being shipwrecked and finding themselves clinging to a single plank, too frail for the support of both. In such a situation

A Tragedy of the Seas

either would have the right to thrust the other from the plank that his own life might be saved. The law would call it excusable homicide.

The Government contended that, as Askin was a passenger, such rule was not applicable in this case, and that it did not apply at any time where one was under legal obligations to the other. It was insisted that it was the duty of the crew to protect the passengers above all things else, and that no sailor had a right to sacrifice a passenger's life even to save his own.

The reply of the defense was that when the ship went down all the contemplated conditions and possibilities of the voyage were ended, all legal obligations absolved, and that no such relation then existed as sailor and passenger. It was submitted that under such circumstances of extreme peril all were reduced to a state of nature, artificial differences were obliterated, and in such crucial hour there was no distinction between the rights of the one and the duties of the other.

David Paul Brown, one of the greatest of American lawyers, made the chief argument in behalf of the prisoner at the bar.

Brown's Appeal for the Sailor

WITH DEFERENCE TO THE COURT:

How wonderful and mysterious, gentlemen of the jury, are the vicissitudes of human life! How frail and precarious are our best holds upon human happiness! Man, the boasted lord of creation, is the sport of every wind that blows, of every wave that flows. He appears like the grass of the field, flourishes and is cut down, and withers ere the setting sun; like the dews of the morning he sparkles for a brief moment and is exhaled. There is nothing earthly *certain* but *uncertainty*; there is nothing *true* but *Heaven*.

What a salutary, practical commentary is supplied by the present intensely interesting occasion upon the truth of this melancholy doctrine. On the thirteenth day of March, in the last year, a staunch and gallant ship, with a competent commander and a noble crew, with sixty-five passengers on board, sailed from the port of Liverpool, destined for that of Philadelphia; a destination, alas! which was never accomplished.

For more than a month, notwithstanding she encountered storms and tempests, she outrode them all; and like a thing of life held on her way rejoicing. On the 19th of the succeeding month, she arrived in fairer climes and enjoyed more propitious gales; but even then, when every heart throbbed with the anticipated joy of a speedy arrival, the angel of destruction spread his broad, black wings above her, and while traversing

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the ocean with all sails set, at the rate of ten knots an hour, she came into collision with an island of ice, and in a moment her pride was prostrate, and the doomed ship was reduced to an actually sinking condition, affording scarcely time for the unhappy inmates, in the moment of their extremest need, to cry, GOD BLESS US. The ocean, her favored element, of which for years she had been the pride, became her sepulcher; and the winds that had borne her upon many a prosperous voyage, sung her only requiem. Here is a scene strikingly presented, in which the theories of philosophy are reduced at once to a frightful reality.

But there is still another picture to which I would invite, and upon which I would fasten, your attention. On that dreadful night, the crew and half the passengers having taken to the boats, the agonizing voice of a mother is heard even beyond the tumult and the clamor, calling for the preservation of her daughter, who in the consternation of the moment had been forgotten, and remained on board the fated ship. In an instant, you may see a gallant, athletic and powerful sailor, passing hand over hand, by dint of a slender rope, until he regains the vessel. And you may further behold him upon the quarter deck in the depth of the night, surrounded by the wild and wasteful ocean, with one arm entwined around a sickly and half naked girl, while, with the other, he bravely swings himself and his almost lifeless burden, by means of the "boat tackle falls," from the stern of the sinking ship into the boat below, and at once re-

stores the child to the open arms and yearning heart of the mother.

Yet to-day, I say it to the disgrace of the law, after months of solitary imprisonment, you here see that self-same heroic sailor arraigned upon the odious charge of having voluntarily and wantonly deprived a fellow-creature of his life; and *that*, gentlemen of the jury, is the charge that I am to argue and you are to determine. I say this is what you are to determine.

It may not be inappropriate, however, though certainly not vital to this cause, that I should ask your attention, in passing to the real subject in controversy, to two other indictments which stain the records of this court, referring to portions of the same transaction: the first, charging the defendant with murder, which the grand jury promptly ignoramused; and the second, in the impotency of disappointed revenge, accusing him of larceny in having stolen "a quilt" of the alleged value of three dollars, which charge shared the same fate. You can form some idea of the dignity of the United States and its value, while observing how it has been cheapened by itself. This very quilt, permit me to remind you, is that which was converted by Holmes into a sail for the boat, in a moment of the extremest peril, in order that he might save the lives of those very beings who gratefully appeared before the grand jury upon the first opportunity, in order to convict their benefactor of these imputed crimes. I shall speak of this hereafter; for the pres-

Brown's Appeal for the Sailor

ent I merely advert to it, and pass at once to more important matters.

In approaching the consideration of this case, which I do with pride and pleasure and confidence, I cannot but express my regret, to adopt a military phrase, that I am called into conflict not only with the regular troops of the United States, but with her recently enlisted *volunteers*. I am sorry that my gallant friend who led on the attack so boldly yesterday, and who is a legitimate leader everywhere, should so far have returned to his first love as to desert the white banner of innocence, under which he has lately so successfully fought, to engage once more beneath the bloody flag of such a prosecution as this. Since it is so, however, let him nail that flag to the mast. We should be happy to abide by every principle of civilized warfare; but in a mortal controversy, in a death struggle like this, we shall neither ask nor will we receive any quarter.

This case, in order to embrace all its horrible relations, ought to be decided in a long boat, hundreds of leagues from the shore, loaded to the very gunwale with forty-two half naked victims; with provisions only sufficient to prolong the agonies of famine and of thirst; with all the elements combined against her; leaking from below, filling also from above; surrounded by ice; unmanageable from her condition, and subject to destruction from the least change of the wind and the waves—the most variable and most terrible of all the elements. Decided at such a tribunal,

nature—intuition—would at once pronounce a verdict, not only of acquittal, but of commendation. The prisoner might, it is true, obtain no outward atonement for nine months of suffering and of obloquy; but he would at least enjoy the satisfaction always to be derived from a consciousness of rectitude, in which the better part of the world sympathizes, and in which it confides.

Is the United States to come here now, a year after the events, when it is impossible to estimate the elements which combined to make the risk, or to say to what extent the jeopardy was imminent; is it with square, rule and compass, deliberately to measure this boat, in this room; to weigh these passengers; call in philosophers; discuss specific gravities; calculate by the tables of a life insurance company the chances of life; and because they, the judges, find that, by their calculation, this unfortunate boat's crew might have had the thousandth part of one poor chance to escape, to condemn this prisoner to chains and a dungeon for what he did in the terror and darkness of that dark and terrible night? Such a mode of testing men's acts and motives is monstrous!

Alas! how different is the scene now exhibited. You sit here, the sworn twelve, the center of that society which you represent, surrounded by the sanctions of those laws which for a time you administer; reposing amidst the comforts and delights of sacred homes; directed and instructed by a judge who, being full of light himself, freely imparts it to all he ap-

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proaches; to decide upon the impulses and motives of the prisoner at the bar, launched upon the bosom of the perilous ocean; surrounded by a thousand deaths in their most hideous forms, with but one plank between him and destruction. What sympathies can be inspired by relative positions so remote, so opposite as these?

Translate yourselves if you can, by the power of imagination, to those scenes, those awful scenes to which this proceeding refers. Fancy yourselves in a frail bark, encompassed by towers of ice, Olympus high, and still magnified by the fear natural to man; exposed to bleak and pitiless winds, surrounded by forty wretches as miserable as yourself, deepening your own afflictions by the contagion of grief; removed a hundred leagues from land, and still further removed by a destitution of those means by which alone it could possibly be reached.

Nay, further. Superadd to these horrors the apprehension of famine, of storm, bearing assured destruction on its wing; and connect all these with the scenes and terrors of the night just past—enough to appall the stoutest heart and overthrow the firmest brain—and then tell me, not what the defendant should have done, but what the most severe and rigid would have done, in trials and perils and calamities like these. It is easy to scorn the tempest while sporting with the zephyr; to laugh at the ocean while secure from its ravages and horrors; to expatiate upon the harmlessness of ice while indulging in it, perhaps

as a luxury; or to underrate famine in the abundance of your supplies; but may that Power that "rides on the whirlwind and directs the storm," protect you against the sad reality of those afflictions which in their mere theory are often so readily overcome by your self-secure, cold-blooded and reckless philosophy. Philosophy readily triumphs over past and future and remote ills; but present and immediate ills grapple closely with the heart, and triumph over philosophy.

Let us now come to those facts which distance and defy all the powers of fancy. Before doing this, however, you will pardon me in examining the legal character of his charge as relates to the Act of Congress, as regards the inherent defects of the indictment, and as respects its inconsistency with the evidence in the cause. I have for the present but a word to say upon each of these subjects, rather to show that they have not been overlooked, than with any intention elaborately to discuss them.

The Act of Congress leaves manslaughter where it was at common law, so far as regards its definition; it only modifies its punishment. The punishment is not more than three years, with a penalty not exceeding one thousand dollars. You have been truly told by the opposite counsel that the court may reduce the sentence to a merely nominal punishment. That is the business of the court, however, and after your verdict is found, your influence is extinct.

Whether the punishment is to be an hour or a year, it is an infamous punishment; and you should be

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equally cautious in resting your verdict upon unquestionable and unsatisfactory proof. I marvel, indeed, that my learned friend, while haranguing you upon the enormity of this offense, should attempt soothing you into a verdict by the suggestion that it would probably be attended with no evil to the defendant. Allow me to deprecate this questionable mercy. It is calculated, if not designed, to seduce you from allegiance to your duties. If the defendant be guilty, he should meet the rigor of the law; if innocent, his rights should not be compromised by the imaginary insignificance of his anticipated punishment. I make no claims upon your charity; my appeals are to your justice.

Now, as to the internal defects of the indictment. The indictment contains four counts for manslaughter. That is, for unlawfully, but without malice, depriving a fellow-creature of his life. Malice would elevate what would otherwise be manslaughter into murder.

The first count charges the homicide on board of the ship *William Brown*, belonging to Stephen Baldwin; the second charges it on board of a vessel, name unknown, belonging to Stephen Baldwin; the third and fourth are the same, with the exception of Thomas Vogel's name being substituted for that of Stephen Baldwin's.

Now, these charges are incompatible with each other, and are calculated to bewilder the prisoner in his defense. They cannot all be true, and as there has been no election on the part of the prosecution, a

verdict upon all will involve an inconsistency obviously illegal, if not utterly fatal.

The doctrine of Milton, as applied to angelic existences, that, vital in every part, they cannot, but "by annihilation, die," is not true in its application to indictments. They are mortal in every part, and the destruction of one part of a count is the destruction of all parts of the same count. One count, it is true, does not destroy another when they are at all compatible with each other, and when an election has been made; but when the charges contained in an indictment are, as in this case, totally inconsistent, if the jury should find a verdict of guilty upon the indictment generally, it will be subject to a motion in arrest of judgment, and it can never stand.

Lastly, I say, if the indictment were unquestionable in itself, it is not supported by the proof. I say nothing in regard to the error in the time stated, which, in some cases, might be fatal, but probably not in this. The ship, as appears by the evidence, neither belonged to Baldwin nor Vogel, but to McCrea, who is not even referred to. Baldwin, however, it is said, held a claim to her, a mortgage upon her as collateral security. That does not improve the case of the prosecution. Special property may be sufficient, but it must be special property accompanied by possession, or, at all events, possession itself, actual or constructive.

Suppose a person were indicted for committing a burglary upon the house of A. B., and upon the trial

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it appeared that the house was the dwelling of E. F., and that the person whose name was introduced into the indictment was merely the mortgagee, certainly the charge could not be sustained for a moment. I merely, for the present, hint at rather than press these objections. I shall, if necessary—which it probably will not be—have the benefit of them hereafter.

We pass now to the law more immediately connected with the facts of this case. Russell, Paley, Rutherford, Blackstone, and, above all, Lord Bacon, are the authorities upon which the entire law of the case rests.

As to Puffendorf, Grotius, Heineccius, and others who have been quoted, with all their lofty pretensions, they do not contain as much wisdom or light as may be found upon each and every page of “the wisest and brightest of mankind.” So far as regards the present subject, they exhibit more pedantry and casuistry than either learning or common sense.

We contend that what is honestly and reasonably believed to be certain death will justify self-defense in the degree requisite for excuse. According to Dr. Rutherford, the law of nature “cannot be supposed to oblige a man to expose his life to such dangers as may be guarded against, and to wait till the danger is just coming upon him, before it allows him to secure himself.” In other words, he need not wait till the certainty of the danger has been proved, past doubt, by the result.

Yet this is the doctrine of the prosecution. They

ask us to wait till the boat has sunk; we may then make an effort to prevent her from sinking. They tell us to wait till all are drowned; we may then make endeavors to save a part. They command us to stand still till we all are lost, past possibility of redemption, and then we may rescue as many as can be saved.

“Where the danger is instantaneous, the mind is too much disturbed,” says Rutherford, in a passage heretofore cited, “to deliberate upon the method of providing for one’s own safety, with the least hurt to an aggressor.” The same author then proceeds: “I see not, therefore, any want of benevolence which can be reasonably charged upon a man in these circumstances, if he takes the most obvious way of preserving himself, though, perhaps, some other method might have been found, which would have preserved him as effectually, and have produced less hurt to the aggressor, if he had been calm enough, and had been allowed time enough to deliberate about it.”

Nor is this the language of approved text-writers alone. The doctrine has the solemnity of judicial establishment. In *Grainger v. The State*, the Supreme Court of Tennessee deliberately adjudges that “If a man, though in no great danger of serious bodily harm, through fear, alarm, or cowardice, kill another, under the impression that great bodily injury is about to be inflicted on him, it is neither manslaughter nor murder, but self-defense.” “It is a different thing,” says the Supreme Court of the United States, in the

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Mariana Flora, "to sit in judgment upon the case, after full legal investigations, aided by the regular evidence of all parties, and to draw conclusions at sea, with very imperfect means of ascertaining facts and principles, which ought to direct the judgment." The decision in the case just cited carried out this principle into practice, as the case of *Le Louis*, decided by Sir William Scott, had done before.

The counsel cited Lord Bacon, likewise. But the prospect of sinking was not imaginary; it was well founded. It is not to be supposed that Holmes, who, from infancy, had been a child of the ocean, was causelessly alarmed; and there being no pretense of animosity, but the contrary, we must infer that the peril was extreme.

I have thus given you the law. There is but little difficulty between us in regard to it. The labor is in the application of the law.

I maintain that a well-founded apprehension of peril to life justifies self-defense, to the extent of destroying the adversary. The opposite counsel maintain that the peril must be actually inevitable. This I deny, and say that it is enough if it be *honestly* and *reasonably supposed* to be so. An *inevitable* danger I don't understand:

They maintain that the peril must be not only inevitable, but immediate. I answer, it need be neither; but it must *reasonably* be *supposed* to be *both*.

Suppose, upon an indictment for manslaughter, a

plank be measured in court, with square, rule and compass, and it be found that it would have sustained two persons; still, is he, who in his terror supposes it would not, to be liable for conviction? Certainly not.

The prosecution contends that if there be a doubt as to the inevitable peril, the defendant is to be convicted. I say it is presumed to have been considered inevitable, from the fact itself; there being no pretense of animosity, but clear evidence of the greatest kindness and sympathy.

They say, that if the danger were inevitable, still the defendant had no right to make selection. To this I reply, that this argument involves the necessity of throwing *all* overboard. The selection would have been just the same if they had destroyed those who are living now, and permitted the others to remain.

But, say they, lots might have been cast. If the peril were inevitable and immediate, that could not have been done. We hear for the first time of casting lots in a sinking boat, where the question is whether any can be saved, rather than who shall be lost. Lots in cases of famine, where means of subsistence are wanting for the number of the crew, are matters which, horrible as they are, are comparatively familiar to us. But to cast lots to see who shall go first, when all are going, is reserved for the ingenuity of the counsel, who constructs a raft on board of ship, in the depth of the night, with the prospect of her going

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down before he drives the first nail, or plies the first rope.

The danger was instantaneous; "a case," says Rutherford, "where the mind is too much disturbed to deliberate"; and where, if it were "more calm," there is no time for deliberation. The sailors adopted the only principle of selection which was possible in an emergency like theirs; a principle more humane than lots. Man and wife were not torn asunder; and the women were all preserved. Lots would have rendered impossible this clear dictate of humanity.

But, again, the crew either were in their ordinary and original state of subordination to their officers or they were in a state of nature. If in the former state, they were excusable in law for having obeyed the order of the mate; an order twice imperatively given. Independent of the mate's general authority in the captain's absence, the captain had pointedly directed the crew to obey all the mate's orders as they would his (the captain's), and the crew had promised to do so.

It imports not to declare that the crew is not bound to obey an unlawful order; for to say that this order was unlawful, is to postulate what remains to be proved. Who is to judge of the unlawfulness? The circumstances were peculiar. The occasion was emergent, without precedent or parallel. The lawfulness of the order is the very question we are disputing, a question about which the whole community has been agitated, and is still divided; the discussion

of which crowds this room with auditors past former example; a question which this court, with all its resources, is now engaged in considering, as such a question demands to be considered, most deliberately, most anxiously, most cautiously. It is no part of a sailor's duty to moralize and to speculate, in such a moment as this was, upon the orders of his superior officers. The commander of a ship, like the commander of an army, "gives desperate commands." He requires instantaneous obedience. The sailor, like the soldier, obeys by instinct.

In the memorable, immortal words of Carnot, when he surrendered Antwerp, in obedience to a command which his pride, his patriotism, and his views of policy all combined to oppose: "The armed force is essentially obedient; it acts, but never deliberates." The greatest man of the French Revolution did here but define, with the precision of the algebraist, what he conceived with the comprehension of a statesman; and his answer was justification with every soldier in Europe.

How far the principle was felt by this crew, let us witness the case of this very mate, and some of these very sailors, who, by the captain's order, left the jolly boat, which had ten persons, for the long boat, with more than four times that number. They all regarded this as going into the jaws of death; yet, not a murmur! It is a well-known fact, that in no marine on the ocean is obedience to orders so habitual and so implicit as in our own. The prisoner had been

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always distinguished by obedience. Whether the mate, if on trial here, would be found innocent, is a question which we need not decide. That question is a different one from the guilt or innocence of the prisoner, and one more difficult.

But if the whole company were reduced to a state of nature, then the sailors were bound to no duty not mutual to the passengers. The contract of the shipping articles had become dissolved by an unforeseen and overwhelming necessity. The sailor was no longer a sailor, but a drowning man. Having fairly done his duty to the last extremity, he was not to lose the rights of a human being, because he wore a roundabout instead of a frock coat.

We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority; the best authority. Whoever opposes it must be wrong, for he opposes human nature. All the contemplated conditions, all the contemplated possibilities of the voyage were ended. The parties—sailors and passengers—were in a new state. All persons on board the vessel became equal; all became their own law-givers; for artificial distinctions cease to prevail when we are reduced to the equality of nature. The law which did prevail on that awful night, having been the law of necessity and the law of nature, too, it is the law which will be upheld by this court to the liberation of this prisoner.

Now I have shown, if these views be sound, that, apart from the preservation of the rest of the passen-

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gers and themselves, these men could have had no inducement to take life; that the magnanimity, gallantry and tenderness of Holmes utterly forbid the idea; that, therefore, it is honestly and fairly to be inferred, that they apprehended immediate peril, and were sustained by the laws of nature in acting accordingly.

As to the circumstance of Frank Askin offering five guineas to preserve his life till morning, and its being refused; that, so far from making against us, makes for us. If they had complied with that request, they must either have sold the lives of all on board for five sovereigns, or have offered conclusive evidence that they did not conceive the peril to be immediate. If they had even received the money, and afterwards deprived him of life, the money itself would have been an indication, either of a corrupt motive, or a reliance on their own security, incompatible with the doctrine for which I contend. It was a terrific deed, to be sure, consider it which way you will; and the very horror of the deed constitutes part of its defense: as it is fairly to be presumed it would not have been resorted to, except in a case of horrible necessity.

The fate of the two sisters is spoken of with peculiar pathos. I maintain their lives were never sacrificed by the crew: because there is no positive proof to that effect—mere loose suggestions or inferences; because there was not a hand laid upon any other woman in the boat; because never mentioned by witnesses upon

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previous examinations; because the conduct of the sisters shows that it was an act of self-devotion, which is almost admitted, indeed; and which adds another bright page to the records of time, exhibiting the fidelity, affection and devotion of a woman's heart.

Considering it in this point of view, its glory is almost equal to its horrors, neither of which is attributable to the defendant. But it is said, that if the passengers had been allowed to live until the next morning, a ship was at hand.

First, I answer, that the probability was that they could not have survived the night; and, secondly, that, without prescience, they could not know of the ship being at hand.

Now let us look to the next morning. The boat is still filled with water, the peril is not abated, and two more half frozen wretches are removed. Some few hours after this, the vessel is discerned, and Holmes and the passengers, through the instrumentality of Holmes, are saved.

As to the notion that there is any distinction between sailors and other men, in their natural rights of self-defense, it is not to be tolerated. If the peril were not imminent, no man had a right to destroy the life of another for the preservation of his own. If it were imminent and apparently inevitable, any man, without regard to condition, vocation or degree, had that right. A state of nature implies the absence of all but natural law; and natural law is not to be affected by artificial distinctions. A sailor is upon

equality with passengers; nay, he is upon an equality with his captain in emergencies like this. With these views of the law let us turn to the facts.

On the 13th of March, 1841, as has been said, the ship sailed from Liverpool to Philadelphia; she came in contact with the ice on the 19th of April, and in one hour and less was reduced to a sinking condition.

The captain having unavailingly attempted the pumps, ordered the boats to be launched from the ship. Thirty-three passengers and nine sailors entered the long boat, and the captain, seven sailors and one passenger entered the jolly boat. The boats were moored at the stern of the ship, by dint of a ten fathom rope, attached to the vessel. In a few minutes the ship sunk forever; the rope being severed at that very moment by Holmes, who was posted for that purpose.

The counsel indulged in a severe and unmeasured attack upon Captain Harris, for having deserted the vessel; maintaining that he was bound to have sunk with her, that he has disgraced the American name by not having done so, and that he presents by his conduct a shameful contrast to Grace Darling, who placed her life in peril to redeem the passengers and crew from a wreck, in the neighborhood of a lighthouse of which her father was the keeper.

Now this is all very poetical, very beautiful, and what embraces more, very gallant on the part of my learned friend. Rather than take the *laurel* from the brow of Grace Darling or any other darling, I would

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wear the *cypress* round my own; but you will still allow me to say, there is a vast difference between an experiment in a lifeboat and almost within hail of the shore, and the scene to which our attention is here called—one hundred leagues from land—in the darkness of night and surrounded by icebergs. The captain was not bound to do more than he did; he was bound to do all that he did. His calmness and composure in the midst of these horrible scenes contributed to save the lives of upwards of fifty human beings; although it is true that he was not enabled to rescue those who remained on board of the ship. Their temporary rescue would have resulted finally in the loss of *all*.

As to his sacrificing his own life, sympathy for others forbade it. If he and all of the sailors had perished, so far from its operating to the benefit of the passengers, it would have proved their inevitable and total destruction.

But, says the gentleman, "Why didn't he construct a raft? he had an hour to do it in." He had no assurance of a moment; the ship was laden with iron; two columns of water of the thickness of a man's body were pouring through the stem of the ship into her very vitals. And although nearly an hour elapsed after leaving her, and before she sunk, how was he to determine upon the probability of her surviving the shock? The learned counsel's argument is quite consistent throughout the case. He says a raft should have been constructed, because it turned out that

the vessel did not sink for an hour; as he says that the men should not have perished, because a ship afterwards hove in sight.

But it is further said by the learned gentleman, that the captain might have taken off more of the passengers. That suggestion is in direct opposition to the evidence. The gunwales of the boat were within six or eight inches of the water; a single additional person would have swamped them; and thus *all* must have perished, perhaps, from an ill-judged effort to save *one*. The conduct of the captain was not only judicious, but humane. If he had returned alongside of the ship, he would have been engulfed by the vortex produced by her sinking, or subjected to a calamity scarcely less terrible, by some of the inmates of the ship jumping into the boats. As to the suggestion that he might have at least rescued the children in the ship, that attempt would have resulted in the same consequence, even supposing that the perishing parents would have been willing to sever themselves, in this moment of direst emergency, from offspring more precious than even life itself.

I have deemed it my duty to say this much in behalf of an absent man, and a most meritorious and exemplary officer; not that it was by any means essential to the defense, but simply because it was an act of justice. If the captain is so disgraceful now in the eyes of the prosecution, so culpable in the eye of the law, why have not our learned adversaries instituted legal proceedings against *him*, instead of at-

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tempting to transfer the burden of his imputed guilt to the shoulders of the *prisoner*? The captain's deposition was taken; he was examined in the office of the attorney for the United States; he was within the very jaws of the Royal Tiger, yet those jaws did not close upon him, with all their thirst for blood. Now, however, that his march is o'er the mountain wave, the counsel speak of his escape from justice, and the horrible retribution that awaits his return. This is the thunder without the bolt, or the power of Jove to wield it.

We pass now to other scenes. In the morning of the 20th of April, which was ushered in in darkness and in gloom, the two boats separated from each other; the captain and eight others directing their course, in the jolly boat, for Newfoundland, and the mate and thirty-three passengers and crew remaining in the long boat. At the time of separation, which was on Tuesday morning, the captain directed his first officer, who had left the jolly boat for the long boat, to endeavor to steer for the nearest point of land, which was two hundred and fifty miles off; and then having taken a list of those on board of the long boat, he bade them a melancholy adieu. In parting, the mate begged him to take some of the passengers into the jolly boat; the captain refused it as a matter of impossibility; the mate declared that his boat would sink, or they should have to cast lots; and the captain, clearly acquiescing in that probable necessity, begged that it might be the last resort.

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Shortly after the departure of the jolly boat, the sad series of disasters commenced, which terminated in the lamentable catastrophe in which this trial originated. Nothing before this point of time bears directly upon this question, although there is much in the scenes referred to, calculated to touch the most callous heart.

At the time the boats parted company, or shortly after, it was raining heavily; the air was very cold, from the proximity of the ice; and the miserable, half naked passengers were benumbed by exposure and hardships to which they had been subjected the preceding night. The long boat had leaked from the time she left the ship; the plug had, in some way, been removed, and another was substituted. The second plug was lost, and a variety of expedients were from time to time resorted to to supply its place, as well as to stop the other leaks. Added to this, the long boat was, in her situation, entirely unmanageable. The testimony of the mate and captain, which is not contradicted by any of the witnesses, places this beyond the reach of doubt. Parker, the mate, says: "I have followed the sea for twenty-one years. I think the long boat was too unmanageable to be saved, from the experience I have had. If there had been no leak, I do not think they would have been able to save themselves." Again, upon the cross-examination: "The long boat being unmanageable, I thought she would have sunk the first night. By "unmanageable" I mean they could not

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put her head from one point to another—she was going round like a tub; she was like her own mistress—they could not keep her head any one way, not even for a minute.”

And Captain Harris is equally clear and explicit upon the subject, when he informs us that the long boat leaked, that they attempted to bail, but with small success because they were so thronged in the boat. “She would not have supported one-half she had in her, had there been a moderate blow, even without a leak. The gunwale was about twelve inches above the surface of the sea.”

Again, speaking on the same subject, the captain says: “I found she was unmanageable, and that it was useless for me to waste further time with them; they could not use the oars; they could not steer the boat.” And, further: “A very little irregularity in stowage would have capsized the long boat; a moderate flaw would have swamped her very quickly.”

On Tuesday it rained heavily all day; the sailors were employed in rowing at times; the passengers took their turns in bailing, and it is perfectly apparent from the proof, that this course continued, with but little intermission or relaxation, until the dreary night closed in. At this time the wind increased, the waves ran high, at times dashing into the boat, depositing ice upon the already half frozen passengers and crew; and at the same time calling for renewed exertion, while impairing the ability to make it.

At length, abandoned to despair, the water increas-

ing in the boat, and the peril of death being imminent and apparently inevitable, a cry of horror is heard from various quarters, exclaiming: "We are sinking! We are sinking!" Then it was that the mate, who, unobtrusively had taken his post in the very throat of death, at the command of the captain, perceiving that everything was reduced to a state of utter hopelessness, and unable longer to repress his emotions, cried out: "Help me, God! this will not do; men, go to work." The witnesses all agree in regard to these expressions of the mate; some, however, say they were thrice repeated before they were obeyed; and finally the obedience of the crew was the death of sixteen of the passengers, by which, alone, in all human probability, the remaining seventeen passengers and nine seamen were saved.

Here let us pause, to ascertain, if we can, what were the impulses, the secret impulses, the direct impulses that led to this deplorable catastrophe. I deny emphatically the correctness of the doctrine of the prosecution, that if there be any doubts of the sufficiency of the cause which led to the death, the defendant should be convicted. This inverts the whole current of the philosophy of criminal jurisprudence. Doubts of motive, doubts of acts, are always doubts of guilt; and reasonable doubts of guilt must result in acquittal.

I am strengthened in this position by the indisputable fact that Holmes, the prisoner, during the whole voyage, was upon the kindest and most harmonious

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terms with all the passengers; that he preserved the same friendly relation to them after the loss of the ship; that he had periled his life more than once to preserve them; that he had literally stripped himself of his apparel for their comfort. In short, his desire to save them seemed to absorb all consideration of mere personal or individual safety. In these circumstances, to suppose anything cruel or wanton upon his part, is to run counter to everything that is possible or natural. I infer, therefore, that he supposed the peril to be imminent and instantaneous, or he never would have complied with the orders of the mate; and that the mate who gave the order, did it under the impression of direct necessity, is too obvious to require or admit of argument.

On Tuesday night, I say, about 10 o'clock, the boat filled with water from above and below. The wind having risen; the waves having increased; the ice accumulating, and the passengers shrieking with horror at the prospect of drowning; the final, fatal order was given. It is not to be supposed that these hardy sons of the sea were unnecessarily alarmed. That Holmes, particularly, was a brave, resolute, and determined seaman, as well as a most humane man, no one will venture to deny; that he had but one supposable object, which was to save such as might be saved, is equally clear. I maintain, therefore, that the most favorable construction is to be placed upon his motives; and it is justly to be inferred that he acted upon the impression that the danger was imminent,

and that death was inevitable to all, except by resorting to those means which he actually adopted.

We are told, however, that he is not the judge. I ask, who is the judge? There is a vast deal of difference between judging in a storm and judging of a representation of a storm; and, therefore, it was that I said, that in order to a righteous determination of this case, your verdict should be rendered in the midst of perils such as have been described, instead of being pronounced while surrounded by all the securities and sanctions of the law.

I agree that if you can conceive of any other inducement than the desire of self-preservation, and that of the majority of the passengers, inducing this act, which I defy you to do, you may then imagine that that inducement led to the act, and thereby divest the prisoner of his present defense; but even taking all the statements of the witnesses for the prosecution, highly colored—I will not say discolored—as they are, and torture them as you may, it is impossible for you to arrive at any other conclusion than that Holmes was actuated by the kindest and most generous influences; and certainly I need not say that kindness and generosity are opposed to wantonness and barbarity.

I repeat, then, that, in these circumstances of terror, men are left to their honest determinations. They are not to resort to mere imaginary evils as a pretext, nor are they to be *supposed* to resort to them as a pretext. If they err in their determination, accord-

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ing to the rules adopted by a cold system of reasoning, their error, as thus detected, is not to be visited upon them as a crime.

Suppose two men, occupying perfectly friendly relations to each other, should be cast away, and both seize the same plank (to me the favorite illustration), and one should thrust the other off; would it not be monstrous, upon the trial of the alleged offender, that the plank should be brought into court and submitted to some men of approved skill, and measured and examined by square, rule and compass; its specific gravity ascertained, and the possibility of its sufficiency to sustain two men discussed and decided; and, upon the basis of such calculation as that, the prisoner should be deprived of his liberty or his life; when, if you had placed the witnesses in his precise situation, and they had been called upon to act upon a sudden emergency, they would have done precisely what he did, and what every principle of natural law abundantly warrants? It is worse than idle to suppose, that, in such a critical juncture as this, men are to cast lots or toss up for their lives.— In such peril a man makes his own law with his own right arm.

But, say the learned counsel, had the passengers been permitted to remain until the morning, they might have been saved by the *Crescent*. I answer, had they remained a single hour, they would have never seen the morning; every man, woman and child, would have weltered in the coral caves of the ocean. The approach of the *Crescent* could not, even in point

of fact, have operated to alleviate their fears. Without prescience, they could have anticipated no such relief. Men are to act upon the past and the present; the future belongs to God alone.

You are told, however, that the condition of the boat was not hopeless; that she was on "the great highroad of nations," and that there was every prospect of her being picked up. The gentleman speaks of the great highroad of nations over the pathless ocean, as if it were the Chesapeake and Delaware Canal, in which two vessels could scarcely pass abreast. The *President*, steamer, sunk probably upon this great highroad, leaving no voice to tell her fate. Surrounded, as the boat was, by mountains of ice, no ship would probably ever have reached her, if steering in that direct course. Fate itself seemed to forbid it. Nay, no vessel, says the captain, would have ventured among the ice, had the position of the boat been known; as no commander, however philanthropic, would have so far periled his own hopes in order to redeem the lives of others. The chances of rescue were entirely too remote then—ninety-nine chances against one, say the witnesses—to enter into the calculation of the mate and crew, had their circumstances ever been such as to allow them dispassionately to reason upon the subject; but as it was, terror had assumed the throne of reason, passion became judgment, and you know the sequel.

I have now briefly and imperfectly passed over that part of the case upon which your decision must

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mainly turn; but before I close, let me direct your attention to another circumstance which casts a reflected light upon the matters already adverted to. I refer to the occurrence of the next day; and this leads me to present to your view another picture in this nautical gallery.

On Wednesday, the 21st of April, the morning dawns; yet the sun still shrouds his face amidst shadowy clouds and darkness, from the traces of horror which the past night had left. You may see, gentlemen of the jury, without any extraordinary stretch of fancy, on that awful morning, a small boat, in the center of the ocean, with a single sailor, apparently engaged in an effort to rig out a sail, baring his brow and his breast to the bleak winds that howl around him, with no one to impart encouragement or aid, deserted by Earth and frowned upon by Heaven. That man was Holmes, the prisoner at the bar. His messmates have sunk exhausted into the bottom of the boat; the mate is lost in dismay; the passengers are buried in hopelessness and horror:

Silent they sit,
All faculties absorbed by black despair;
The world is banish'd, and the soul is dead
To earthly sympathy—to earthly care,
Brooding alone on its eternal fate,
And prostrate in the presence of its God.

And there, amidst this solemn and harrowing scene, the defendant stands, toiling and struggling to the

last, not for himself, but for those very persons who, having forgotten their gratitude with their danger, now appear before you to pay for their own life by depriving their preserver of his. Whether this mode of discharging obligations shall meet with your approval, it will remain for your verdict to decide.

I have now done. I am perfectly sensible of the power of the learned counsel opposed to me; and if this case is to be determined by the comparative strength or skill of the advocates, I have much cause for alarm. My gallant friend who opened the conflict, appeared like Apollo, radiant in his glory, balancing his body, adjusting his bow, and directing his shaft—*his golden pointed shaft*—at the very heart of his intended victim. By and by, his colleague, who may be compared to Hercules, will take the field with his club, and exert all his stupendous powers to demolish this defense. Still, armed in the panoply of justice, I entertain no fear, for after all, gentlemen of the jury, what is a giant when wrapped up in a “QUILT”? Against all these odds, therefore, I stand firmly by the side of that man, who always stood firmly by others. The destiny, the worldly destiny, of the prisoner is now confided to your hands. Do with him as you would be done by.

At the conclusion of the final argument, the charge of the court was delivered to the jury.

On the main question involved, the court charged in substance as follows:

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"The passenger stands in a position different from that of officers and seamen. It is the sailor's duty to encounter the hardships and perils of the voyage. The passenger owes no duty but submission; he is under no obligation to protect and keep the conductor in safety; he is not bound to labor, except in cases of emergency, where his services are required by unanticipated and uncommon danger.

"This relation is not changed when the ship is lost by tempest or other dangers of the sea, because impending danger cannot absolve from duty. Should the danger become extreme, so as to require the sacrifice of human life, the rule of law is the same. Since the passenger is not bound to labor or incur the risk of life, he is not bound to sacrifice his existence to preserve the sailor.

"The captain and a sufficient number of seamen to navigate the boat must be preserved, 'for except these abide in the ship all shall likewise perish'; but supernumerary sailors have no right to sacrifice the passengers to secure their own safety. In the eye of the law the positions of sailor and passenger are not equal.

"As between sailor and sailor, or passenger and passenger, they may lawfully struggle with each other for the same plank which can save but one; but if the passenger is on the plank, even the law of necessity justifies not the sailor who takes it from him.

"As between those in equal relations, they must have an equal chance for life when the destruction is ascertained to be certain, and must arrive in the near future. As, for example, when all sustenance has been exhausted, and a sacrifice of one person is necessary to appease the hunger of the others, the fairest mode of selection is by lot, which all writers have regarded as just, being in one sense an appeal to God for the selection of the victim."

It is thus seen that the contentions of the defendant's counsel as to the law of the case were not upheld by the trial court.

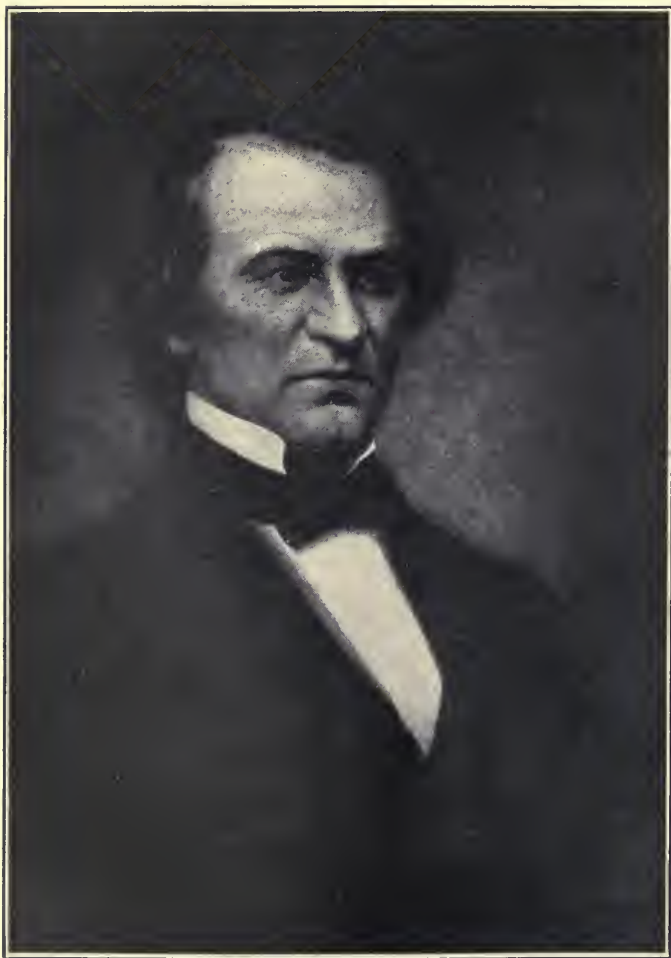
After many hours' deliberation, the jury agreed on a verdict finding the sailor guilty. He was sentenced to six months' imprisonment and to pay a fine of twenty dollars.

An appeal was taken but the judgment was affirmed, the Appellate Court holding the law of the ocean to be:

"It is a sailor's duty to protect persons entrusted to his care, not to sacrifice them; and this obligation rests upon him at all times, in every emergency of his calling. He must expose himself to every danger, and protect the life of the passenger to the last extremity.

"Where two persons who owe no mutual duty to each other, are by accident placed in a situation where both cannot survive, neither is bound to save the other's life by sacrificing his own; nor would either commit a crime in saving his own life, in a struggle for the only means of safety.

"Therefore, not only the jeopardy, but the relations in which the parties stand, should be considered, because the slayer must be under no obligations to make his own safety secondary to the safety of others."



Andrew Johnson

The Impeachment Trial of Andrew Johnson

THE American House of Representatives, on February 24, 1868, adopted a resolution preferring articles of impeachment against Andrew Johnson, President of the United States.

The President was charged with offending against the Constitution and unlawfully conspiring to violate certain laws and contriving to prevent their execution. Another allegation was that he had attempted, in some of his speeches, to bring Congress into disrepute. There were eleven articles on which the impeachment was based. What was regarded as the real issue, however, rested on the specific charge that the President had violated the tenure-of-office act in removing from office Edwin M. Stanton, Secretary of War, and appointing in his stead General Lorenzo Thomas.

The House of Representatives elected as managers to represent it at the trial, Thaddeus Stevens, Thomas Williams, John A. Logan, George S. Boutwell, John A. Bingham, James F. Wilson, and Benjamin F. Butler. The President was represented by William M.

Evarts, Henry Stanberry, William S. Groesbeck, T. A. R. Nelson, and Benjamin R. Curtis.

In accordance with the provisions of law applicable in such cases the trial took place before the U. S. Senate, sitting as a high court of impeachment, and presided over by the Chief Justice of the Supreme Court of the United States. Hon. Salmon P. Chase was the Justice presiding.

On March 5th, the charges were formally presented at the bar of the Senate by the House managers. The answer of the President was received soon after. The evidence was then presented and the arguments delivered for the prosecution and the defense.

It was a memorable forensic battle and the trial lasted several weeks.

The opening speech in behalf of the President was made by Benjamin R. Curtis.

Curtis's Defense of the President

MR. CHIEF JUSTICE:

I am here to speak to the Senate of the United States sitting in its judicial capacity as a court of impeachment, presided over by the Chief Justice of the United States, for the trial of the President of the United States. This statement sufficiently characterizes what I have to say. Here party spirit, political schemes, foregone conclusions,

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outrageous biases can have no fit operation. The Constitution requires that here should be a "trial," and as in that trial the oath which each one of you has taken is to administer "impartial justice according to the Constitution and the laws," the only appeal which I can make in behalf of the President is an appeal to the conscience and the reason of each judge who sits before me. Upon the law and the facts, upon the judicial merits of the case, upon the duties incumbent on that high officer by virtue of his office, and his honest endeavor to discharge those duties, the President rests his defense. And I pray each one of you to listen to me with that patience which belongs to a judge for his own sake, which I cannot expect to command by any efforts of mine, while I open to you what that defense is.

The honorable managers, through their associate who has addressed you—Mr. Butler—has informed you that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Upon those subjects I shall have something hereafter to say. The honorable manager did not tell you, in terms at least, that here are no articles before you, because a statement of that fact would be in substance to say that here are no honorable managers before you; inasmuch as the only authority with which the honorable managers are clothed by the House of Representatives is an authority to present here at your bar certain articles, and, within their limits, conduct this prosecution; and therefore I shall

make no apology, Senators, for asking your close attention to these articles, one after the other, in manner and form as they are here presented, to ascertain, in the first place, what are the substantial allegations in each of them, what is the legal operation and effect of those allegations, and what proof is necessary to be adduced in order to sustain them.

And I shall begin with the first, not merely because the House of Representatives, in arranging these articles, has placed that first in order, but because the subject-matter of that article is of such a character that it forms the foundation of the first eight articles in the series, and enters materially into two of the remaining three.

What, then, is the substance of this first article? What, as the lawyers say, are the *gravamina* contained in it? There is a great deal of verbiage—I do not mean by that, unnecessary verbiage—in the description of the substantive matters set down in this article. Stripped of that verbiage, it amounts exactly to these things: First, that the order set out in the article for the removal of Mr. Stanton, if executed, would be a violation of the tenure-of-office act; second, that it was a violation of the tenure-of-office act; third, that it was an intentional violation of the tenure-of-office act; fourth, that it was a violation of the Constitution of the United States; and, fifth, was by the President intended to be so. Or, to draw all this into one sentence which yet may be intelligible and clear enough, I suppose the substance of this

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first article is that the order for the removal of Mr. Stanton was, and was intended to be, a violation of the tenure-of-office act, and was intended to be a violation of the Constitution of the United States. These are the allegations which it is necessary for the honorable managers to make out in proof to support that article.

Now, there is a question involved here which enters deeply, as I have already intimated, into the first eight articles in this series, and materially touches two of the others; and to that question I desire in the first place to invite the attention of the court. That question is whether Mr. Stanton's case comes under the tenure-of-office act. If it does not—if the true construction and effect of the tenure-of-office act, when applied to the facts of his case, exclude it—then it will be found by honorable Senators, when they come to examine this and the other articles, that a mortal wound has been inflicted upon them by that decision.

I must therefore ask your attention to the construction and application of the first section of the tenure-of-office act. It is, as Senators know, but dry work. It requires close, careful attention and reflection; no doubt it will receive them. Allow me, in the first place, to read that section:

That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be ap-

pointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in a like manner appointed and duly qualified, except as herein otherwise provided.

Then comes what is "otherwise provided":

Provided, that the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate."

Here is a section, then, the body of which applies to all civil officers, as well to those then in office as to those who should thereafter be appointed. The body of that section contains a declaration that every such officer "is"—that is, if he is now in office—"and shall be"—that is, if he shall hereafter be appointed to office—entitled to hold until a successor is appointed and qualified in his place. That is the body of the section. But out of this body of the section it is explicitly declared that there is to be excepted a particular class of officers—"except as herein otherwise provided." There is to be excepted out of this general description of all civil officers a particular class of officers as to whom something is "otherwise provided"—that is, a different rule is to be announced for them. The Senate will perceive that, in the body of the section, all officers, as well those then holding

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office as those thereafter to be appointed, are included. The language is:

Every person holding any civil office to which he has been appointed, . . . and every person who shall hereafter be appointed, . . . is and shall be entitled, and so forth.

It affects the present; it sweeps over all who are in office and come within the body of the section; it includes by its terms as well those now in office as those who may be hereafter appointed. But when you come to the proviso, the first noticeable thing is that this language is changed. It is not that "every Secretary who now is, and hereafter may be, in office shall be entitled to hold that office" by a certain rule which is here prescribed; but the proviso, while it fixes a rule for the future only, makes no declaration of the present right of one of this class of officers, and the question whether any particular Secretary comes within that rule depends on another question—whether his case comes within the description contained in the proviso. There is no language which expressly brings him within the proviso; there is no express declaration, as in the body of the section, that "he is, and hereafter shall be, entitled" merely because he holds the office of Secretary at the time of the passage of the law. There is nothing to bring him within the proviso, I repeat, unless the description which the proviso contains applies to and includes his case. Now, let us see if it does:

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That the Secretaries of State, etc., shall hold their offices respectively for and during the term of the President by whom they may have been appointed.

The first inquiry which arises on this language is as to the meaning of the words "for and during the term of the President." Mr. Stanton, as appears by the commission which has been put into the case by the honorable managers, was appointed in January, 1862, during the first term of President Lincoln. Are these words, "during the term of the President," applicable to Mr. Stanton's case? That depends upon whether an expounder of this law judicially, who finds set down in it as a part of the descriptive words, "during the term of the President," has any right to add, "and any other term for which he may afterwards be elected." By what authority short of legislative power can those words be put into the statute, so that "during the term of the President" shall be held to mean, "and any other term or terms for which the President may be elected"? I respectfully submit no such judicial interpretation can be put on the words.

Then, if you please, take the next step. "During the term of the President by whom he was appointed." At the time when this order was issued for the removal of Mr. Stanton, was he holding "during the term of the President by whom he was appointed"? The honorable managers say "Yes," because, as they say, Mr. Johnson is merely serving out the residue of Mr. Lincoln's term. But is that so under the pro-

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visions of the Constitution of the United States? I pray you to allow me to read two clauses which are applicable to this question. The first is the first section of the second article:

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows:

There is a declaration that the President and the Vice President is each respectively to hold his office for the term of four years. But that does not stand alone; here is its qualification:

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President.

So that, although the President, like the Vice President, is elected for a term of four years, and each is elected for the same term, the President is not to hold his office absolutely during four years. The limit of four years is not an absolute limit. Death is a limit. A "conditional limitation," as the lawyers call it, is imposed on his tenure of office. And when, according to this second passage which I have read, the President dies, his term of four years, for which he was elected, and during which he was to hold, provided he should so long live, terminates, and the office devolves on the Vice President. For what

period of time? For the remainder of the term for which the Vice President was elected.

And there is no more propriety, under these provisions of the Constitution of the United States, in calling the time during which Mr. Johnson holds the office of President after it was devolved upon him, a part of Mr. Lincoln's term than there would be propriety in saying that one sovereign who succeeded to another sovereign by death holds a part of his predecessor's term.

The term assigned to Mr. Lincoln by the Constitution was conditionally assigned to him. It was to last four years, if not sooner ended; but if sooner ended by his death, then the office was devolved on the Vice President, and the term of the Vice President to hold the office then began.

I submit, then, that upon this language of the act it is apparent that Mr. Stanton's case cannot be considered as within it. This law, however, as Senators very well know, had a purpose. There was a practical object in the view of Congress; and, however clear it might seem that the language of the law, when applied to Mr. Stanton's case, would exclude that case,—however clear that might seem on the mere words of the law,—if the purpose of the law could be discerned, and that purpose plainly required a different interpretation, that different interpretation should be given. But, on the other hand, if the purpose in view was one requiring that interpretation to which I have been drawing your attention,

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then it greatly strengthens the argument; because not only the language of the act itself, but the practical object which the Legislature had in view in using that language, demands that interpretation.

Now, there can be no dispute concerning what that purpose was, as I suppose. Here is a peculiar class of officers singled out from all others, and brought within this provision. Why is this? It is because the Constitution has provided that these principal officers in the several executive departments may be called upon by the President for advice "respecting"—for that is the language of the Constitution—"their several duties," not, as I read the Constitution, that he may call upon the Secretary of War for advice concerning questions arising in the Department of War. He may call upon him for advice concerning questions which are a part of the duty of the President, as well as questions which belong only to the Department of War. Allow me to read that clause of the Constitution, and see if this be not its true interpretation. The language of the Constitution is that:

He [the President] may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices.

—As I read it, relating to the duties of the offices of these principal officers, or relating to the duties of the President himself. At all events, such was the

practical interpretation put upon the Constitution from the beginning of the Government; and every gentleman who listens to me who is familiar, as you all are, with the political history of the country, knows that from an early period of the administration of General Washington, his Secretaries were called upon for advice concerning matters not within their respective departments, and so the practice has continued from that time to this. This is one thing which distinguishes this class of officers from any other embraced within the body of the law.

But there is another. The Constitution undoubtedly contemplated that there should be executive departments created, the heads of which were to assist the President in the administration of the laws, as well as by their advice. They were to be the hands and voice of the President; and, accordingly, that has been so practiced from the beginning, and the legislation of Congress has been framed on this assumption in the organization of the departments, and emphatically in the act which constituted the Department of War. That provides, as Senators well remember, in so many words, that the Secretary of War is to discharge such duties of a general description there given as shall be assigned to him by the President, and that he is to perform them under the President's instructions and directions. Let me repeat that the Secretary of War and the other Secretaries, the Postmaster General, and the Attorney General are deemed to be the assistants of the Presi-

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dent in the performance of his great duty to take care that the laws are faithfully executed; that they speak for and act for him.

Now, do not these two views furnish the reasons why this class of officers was excepted out of the law? They were to be the advisers of the President. They were to be the immediate confidential assistants of the President, for whom he was to be responsible, but in whom he was expected to repose a great amount of trust and confidence; and therefore it was that this act has connected the tenure of office of these Secretaries to which it applies with the President by whom they were appointed. It says, in the description which the act gives of the future tenure of office of Secretaries, that a controlling regard is to be had to the fact that the Secretary whose tenure is to be regulated was appointed by some particular President, and during the term of that President he shall continue to hold his office; but as for Secretaries who are in office, not appointed by the President, we have nothing to say—we leave them as they heretofore have been.

I submit to Senators that this is the natural and, having regard to the character of these officers, the necessary conclusion, that the tenure of the office of a Secretary here described is a tenure during the term of service of the President by whom he was appointed; that it was not the intention of Congress to compel a President of the United States to continue in office a Secretary not appointed by himself.

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We have, however, fortunately, not only the means of interpreting this law which I have alluded to, namely, the language of the act, the evident character and purpose of the act, but we have decisive evidence of what was intended and understood to be the meaning and effect of this law in each branch of Congress at the time when it was passed. In order to make this more apparent, and its just weight more evident, allow me to state what is very familiar, no doubt, to Senators, but which I wish to recall to their minds, the history of this proviso, this exception.

The bill, as Senators will recollect, originally excluded these officers altogether. It made no attempt—indeed, it rejected all attempts—to prescribe a tenure of office for them as inappropriate to the necessities of the Government; so the bill went to the House of Representatives. It was there amended by putting the Secretaries on the same footing as all other civil officers appointed with the advice and consent of the Senate, and, thus amended, came back to this body. This body disagreed to the amendment. Thereupon a committee of conference was appointed, and that committee, on the part of the House, had for its chairman Hon. Mr. Schenck, of Ohio, and, on the part of this body, Hon. Mr. Williams, of Oregon, and Hon. Mr. Sherman, of Ohio. The committee of conference came to an agreement to alter the bill by striking these Secretaries out of the body of the bill, and inserting them in the proviso containing the matter now under consideration.

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Of course, when this report was made to the House of Representatives and to this body, it was incumbent on the committee charged with looking after its intentions and estimates of the public necessities in reference to that conference—it was expected that they would explain what had been agreed to, with a view that the body itself, thus understanding what had been agreed to be done, could proceed to act intelligently on the matter.

Now, I wish to read to the Senate the explanation given by Hon. Mr. Schenck, the chairman of this conference on the part of the House, when he made his report to the House concerning this proviso. After the reading of the report Mr. Schenck said:

I propose to demand the previous question upon the question of agreeing to the report of the committee of conference; but before doing so I will explain to the House the condition of the bill, and the decision of the conference committee upon it. It will be remembered that by the bill as it passed the Senate it was provided that the concurrence of the Senate should be required in all removals from office, except in the case of the heads of departments. The House amended the bill of the Senate so as to extend this requirement to the heads of departments as well as to other officers.

The committee of conference have agreed that the Senate shall accept the amendment of the House. But, inasmuch as this would compel the President to keep around him heads of departments until the end of his term, who would hold over to another term, a compromise was made, by which a further amendment is added to this portion of the

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bill, so that the term of office of the heads of departments shall expire with the term of the President who appointed them, allowing those heads of departments one month longer, in which, in case of death or otherwise, other heads of departments can be named. This is the whole effect of the proposition reported by the committee of conference. It is, in fact, an acceptance by the Senate of the position taken by the House.

Then a question was asked, whether it would be necessary that the Senate should concur in all other appointments, etc., in reply to which Mr. Schenck said:

That is the case. But their terms of office [that is, the Secretaries' terms of office] are limited, as they are not now limited by law, so that they expire with the term of service of the President who appoints them, and one month after, in case of death or other accident, until others can be substituted for them by the incoming President.

Allow me to repeat that sentence:

They expire with the term of service of the President who appoints them, and one month after, in case of death or other accident.

In this body, on the report being made, the chairman, Hon. Mr. Williams, made an explanation. That explanation was, in substance, the same as that made by Mr. Schenck in the House, and thereupon a considerable debate sprang up, which was not the case in the House, for this explanation of Mr. Schenck

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was accepted by the House as correct, and unquestionably was acted upon by the House as giving the true sense, meaning, and effect of this bill. In this body, as I have said, a considerable debate sprang up. It would take too much of your time and too much of my strength to undertake to read this debate, and there is not a great deal of it which I can select, so as to present it fairly and intelligibly, without reading the accompanying parts; but I think the whole of it may fairly be summed up in this statement: that it was charged by one of the honorable Senators from Wisconsin that it was the intention of those who favored this bill to keep in office Mr. Stanton and certain other Secretaries. That was directly met by the honorable Senator from Ohio, one of the members of the committee of conference, by this statement:

I do not understand the logic of the Senator from Wisconsin. He first attributes a purpose to the committee of conference which I say is not true. I say that the Senate have not legislated with a view to any persons or any President, and therefore he commences by asserting what is not true. We do not legislate in order to keep in the Secretary of War, the Secretary of the Navy, or the Secretary of State.

Then a conversation arose between the honorable Senator from Ohio and another honorable Senator, and the honorable Senator from Ohio continued thus:

That the Senate had no such purpose is shown by its vote twice to make this exception. That this provision

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does not apply to the present case is shown by the fact that its language is so framed as not to apply to the present President. The Senator shows that himself, and argues truly that it would not prevent the present President from removing the Secretary of War, the Secretary of the Navy, and Secretary of State. And if I supposed that either of these gentlemen was so wanting in manhood, in honor, as to hold his place after the politest intimation by the President of the United States that his services were no longer needed, I certainly, as a Senator, would consent to his removal at any time, and so would we all.

I read this, Senators, not as expressing the opinion of an individual Senator concerning the meaning of a law which was under discussion, and was about to pass into legislation. I read it as the report; for it is that in effect—the explanation, rather, of the report of the committee of conference appointed by this body to see whether this body could agree with the House of Representatives in the frame of this bill, which committee came back here with a report that a certain alteration had been made and agreed upon by the committee of conference, and that its effect was what is above stated. And now I ask the Senate, looking at the language of this law, looking at its purpose, looking at the circumstances under which it was passed, the meaning thus attached to it by each of the bodies which consented to it, whether it is possible to hold that Mr. Stanton's case is within the scope of that tenure-of-office act? I submit it is not possible.

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I now return to the allegations in this first article; and the first allegation, as Senators will remember, is that the issuing of the order which is set out in the article was a violation of the tenure-of-office act. It is perfectly clear that is not true. The tenure-of-office act, in the sixth section, enacts "that every removal, appointment, or employment made, had, or exercised contrary to the provisions of this act," etc., shall be deemed a high misdemeanor. "Every removal contrary to the provisions of this act." In the first place no removal has taken place. They set out an order. If Mr. Stanton had obeyed that order, there would have been a removal; but inasmuch as Mr. Stanton disobeyed that order, there was no removal. So it is quite clear that, looking to this sixth section of the act, they have made out no case of a removal within its terms, and therefore no case of violation of the act by a removal. But it must not only be a removal, it must be "contrary to the provisions of this act"; and therefore, if you could hold the order to be in effect a removal, unless Mr. Stanton's case was within this act, unless this act gave Mr. Stanton a tenure of office, and protected it, of course the removal, even if it had been actual, instead of attempted, merely, would not have been "contrary to the provisions of the act," for the act had nothing to do with it.

But this article, as Senators will perceive on looking at it, does not allege simply that the order for the removal of Mr. Stanton was a violation of the tenure-

of-office act. The honorable House of Representatives has not, by this article, attempted to erect a mistake into a crime. I have been arguing to you at considerable length, no doubt trying your patience thereby, the construction of that tenure-of-office law. I have a clear idea of what its construction ought to be. Senators, more or less of them who have listened to me, may have a different view of its construction, but I think they will in all candor admit that there is a question of construction. There is a question of what the meaning of this law was; a question whether it was applicable to Mr. Stanton's case; a very honest and solid question, which any man could entertain, and therefore I repeat, it is important to observe that the honorable House of Representatives has not, by this article, endeavored to charge the President with a high misdemeanor because he had been honestly mistaken in construing that law. They go further, and take the necessary step. They charge him with intentionally misconstruing it. They say: "which order was unlawfully issued with intention then and there to violate said act." So that, in order to maintain the substance of this article, without which it was not designed by the House of Representatives to stand, and cannot stand, it is necessary for them to show that the President willfully misconstrued this law; that, having reason to believe, and actually believing, after the use of due inquiry, that Mr. Stanton's case was within the law, he acted as if it was not within the law. That is the substance of

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the charge. What of the proof in support of that allegation offered by the honorable managers?

Senators must undoubtedly be familiar with the fact that the office of President of the United States, as well as many other executive offices, and, to some extent, legislative offices, call upon those who hold them for the exercise of judgment and skill in the construction and application of laws. It is true that the strictly judicial power of the country, technically speaking, is vested in the Supreme Court and such inferior courts as Congress from time to time has established or may establish. But there is a great mass of work to be performed by executive officers in the discharge of their duties, which is of a judicial character. Take, for instance, all that is done in the auditing of accounts. That is judicial, whether it be done by an auditor or a comptroller, or whether it be done by a chancellor; and the work has the same character whether done by one or by the other. They must construe and apply the laws; they must investigate and ascertain facts; they must come to some results compounded of the law and of the facts.

Now, this class of duties the President of the United States has to perform. A case is brought before him which, in his judgment, calls for action. His first inquiry must be, what is the law on the subject? He encounters, among other things, this tenure-of-office law in the course of his inquiry. His first duty is to construe that law to see whether it applies to the

case; to use, of course, in doing so, all those means and appliances which the Constitution and the laws of the country have put into his hands to enable him to come to a correct decision. But after all he must decide in order either to act or to refrain from action. That process the President in this case was obliged to go through, and did go through; and he came to the conclusion that the case of Mr. Stanton was not within this law. He came to that conclusion, not merely by an examination of this law himself, but by resorting to the advice which the Constitution and laws of the country enable him to call for to assist him in coming to a correct conclusion. Having done so, is the Senate prepared to say that the conclusion he reached must have been a willful misconstruction, so willful, so wrong, that it can justly and properly, and for the purpose of this prosecution, effectively be termed a high misdemeanor? How does the law read? What are its purposes and objects? How was it understood here at the time when it was passed? How is it possible for this body to convict the President of the United States of a high misdemeanor for construing a law as those who made it construed it at the time when it was made?

I submit to the Senate that thus far no great advance has been made towards the conclusion either that the allegation in this article that this order was a violation of the tenure-of-office act is true, or that there was an intent on the part of the President thus to violate it; and although we have not yet gone over

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all the allegations in this article, we have met its "head and front," and what remains will be found to be nothing but incidental and circumstantial, and not the principal subject. If Mr. Stanton was not within this act; if he held the office of Secretary for the Department of War at the pleasure of President Johnson, as he held it at the pleasure of President Lincoln; if he was bound by law to obey that order which was given to him, and quit the place, instead of being sustained by law in resisting that order, I think the honorable managers will find it extremely difficult to construct, out of the broken fragments of this article, anything which will amount to a high misdemeanor. What are they? They are, in the first place, that the President did violate, and intended to violate, the Constitution of the United States, by giving this order. Why? They say, as I understand it, because the order of removal was made during the session of the Senate; that for that reason the order was a violation of the Constitution of the United States. I desire to be understood on this subject. If I can make my own ideas of it plain, I think nothing is left of this allegation. In the first place, the case, as Senators will observe, which is now under consideration, is the case of a Secretary of War holding during the pleasure of the President by the terms of his commission; holding under the act of 1789, which created that department, which, although it does not affect to confer on the President the power to remove the Secretary, does clearly imply that he

has that power by making a provision for what shall happen in case he exercises it.

That is the case which is under consideration, and the question is this: whether, under the law of 1789 and the tenure of office created by that law—designedly created by that law—after the great debate of 1789, and whether under a commission which conforms to it, holding during the pleasure of the President, the President could remove such a Secretary during the session of the Senate. Why not? Certainly there is nothing in the Constitution of the United States to prohibit it. The Constitution has made two distinct provisions for filling offices. One is by nomination to the Senate, and confirmation by them, and a commission by the President upon that confirmation. The other is by commissioning an officer when a vacancy happens during the recess of the Senate. But the question now before you is not a question how vacancies shall be filled—that the Constitution has thus provided for; it is a question how they may be created, and when they may be created—a totally distinct question.

Whatever may be thought of the soundness of the conclusion arrived at upon the great debate of 1789 concerning the tenure of office, or concerning the power of removal from office, no one, I suppose, will question that a conclusion was arrived at, and that conclusion was that the Constitution had lodged with the President the power of removal from office independently of the Senate. This may be a decision

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proper to be reversed; it may have been now reversed—of that I say nothing at present. But that it was made, and that the legislation of Congress of 1789 and so on down during the whole period of legislation to 1867 proceeded upon the assumption, express or implied, that that decision had been made, nobody who understands the history of the legislation of the country will deny.

Consider, if you please, what this decision was. It was that the Constitution had lodged this power in the President; that he alone was to exercise it; that the Senate had not and could not have any control whatever over it. If that be so, of what materiality is it whether the Senate is in session or not? If the Senate is not in session, and the President has this power, a vacancy is created, and the Constitution has made provision for filling that vacancy by commission until the end of the next session of the Senate. If the Senate is in session, then the Constitution has made provision for filling a vacancy which is created by a nomination to the Senate; and the laws of the country, as I am presently going to show you somewhat in detail, have made provisions for filling it *ad interim* without any nomination, if the President is not prepared to make a nomination at the moment when he finds the public service requires the removal of an officer.

So that, if this be a case within the scope of the decision made by Congress in 1789, and within the scope of the legislation which followed upon that

decision, it is a case where, either by force of the Constitution the President had the power of removal without consulting the Senate, or else the legislation of Congress had given it to him; and, either way, neither the Constitution nor the legislation of Congress had made it incumbent on him to consult the Senate on the subject.

I submit, then, that if you look at this matter of Mr. Stanton's removal just as it stands on the decision in 1789, or on the legislation of Congress following upon that decision, and in accordance with which are the terms of the commission under which Mr. Stanton held office, you must come to the conclusion, without any further evidence on the subject, that the Senate had nothing whatever to do with the removal of Mr. Stanton, either to advise for it or to advise against it; that it came either under the constitutional power of the President as it had been interpreted in 1789, or it came under the grant made by the Legislature to the President in regard to all those Secretaries not included within the tenure-of-office bill. This, however, does not rest simply upon this application of the Constitution and of the legislation of Congress.

There has been, and we shall bring it before you, a practice by the Government, going back to a very early day, and coming down to a recent period, for the President to make removals from office when the case called for them, without regard to the fact whether the Senate was in session or not. The instances, of

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course, would not be numerous. If the Senate was in session, the President would send a nomination to the Senate, saying: "A. B., in place of C. D., removed." But then there were occasions—not frequent, I agree, but there were occasions, as you will see might naturally happen—when the President, perhaps, had not had time to select a person whom he would nominate, and when he could not trust the officer then in possession of the office to continue in it, when it was necessary for him, by a special order, to remove him from the office wholly independent of any nomination sent in to the Senate.

Let me bring before your consideration for a moment a very striking case which happened recently enough to be within the knowledge of many of you. We were on the eve of a civil war. The War Department was in the hands of a man who was disloyal and unfaithful to his trust. His chief clerk, who, on his removal or resignation, would come into the place, was believed to be in the same category with his master. Under those circumstances, the President of the United States said to Mr. Floyd, "I must have possession of this office," and Mr. Floyd had too much good sense, or good manners, or something else, to do anything but resign, and instantly the President put into the place General Holt, the Postmaster General of the United States at the time, without the delay of an hour. It was a time when a delay of twenty-four hours might have been of vast practical consequence to the country. There are classes of

cases arising in all the departments of that character followed by that action, and we shall bring before you evidence showing what those cases have been, so that it will appear that, so long as officers held at the pleasure of the President, and wholly independent of the advice which he might receive in regard to their removal from the Senate, so long, whenever there was an occasion, the President used the power, whether the Senate was in session or not.

I have now gone over, Senators, the considerations which seem to me to be applicable to the tenure-of-office bill, and to this allegation which is made that the President knowingly violated the Constitution of the United States in the order for the removal of Mr. Stanton from office while the Senate was in session; and the counsel for the President feel that it is not essential to his vindication from this charge to go further upon this subject. Nevertheless, there is a broader view upon this matter, which is an actual part of the case—and it is due to the President it should be brought before you—that I now propose to open to your consideration. The Constitution requires the President to take care that the laws be faithfully executed. It also requires of him, as a qualification for his office, to swear that he will faithfully execute the laws, and that, to the best of his ability, he will preserve, protect, and defend the Constitution of the United States.

I suppose every one will agree that, so long as the President of the United States, in good faith, is en-

deavoring to take care that the laws be faithfully executed, and in good faith, and to the best of his ability, is preserving, protecting, and defending the Constitution of the United States, although he may be making mistakes, he is not committing high crimes or misdemeanors. In the execution of these duties, the President found, for reasons which it is not my province at this time to enter upon, but which will be exhibited to you hereafter, that it was impossible to allow Mr. Stanton to continue to hold the office of one of his advisers, and to be responsible for his conduct in the manner he was required by the Constitution and laws to be responsible, any longer. This was intimated to Mr. Stanton, and did not produce the effect which, according to the general judgment of well-informed men, such intimations usually produce. Thereupon the President first suspended Mr. Stanton, and reported that to the Senate. Certain proceedings took place, which will be adverted to more particularly presently. They resulted in the return of Mr. Stanton to the occupation by him of this office. Then it became necessary for the President to consider, first, whether this tenure-of-office law applied to the case of Mr. Stanton; secondly, if it did apply to the case of Mr. Stanton, whether the law itself was the law of the land, or was merely inoperative because it exceeded the constitutional power of the Legislature.

I am aware that it is asserted to be the civil and moral duty of all men to obey those laws which have

been passed through all the forms of legislation until they shall have been decreed by judicial authority not to be binding; but this is too broad a statement of the civil and moral duty incumbent either upon private citizens or public officers. If this is the measure of duty, there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it. I submit to Senators that not only is there no such rule of civil or moral duty, but that it may be and has been a high and patriotic duty of a citizen to raise a question whether a law is within the Constitution of the country.

Will any man question the patriotism or the propriety of John Hampden's act when he brought the question whether "ship money" was within the Constitution of England before the courts of England? Not only is there no such rule incumbent upon private citizens which forbids them to raise such questions, but, let me repeat, there may be, as there not unfrequently have been, instances in which the highest patriotism and the purest civil and moral duty require it to be done.

Let me ask any of you, if you were a trustee for the rights of third persons, and those rights of third persons, which they could not defend themselves by reason, perhaps, of sex or age, should be attacked by an unconstitutional law, should you not deem it to be your sacred duty to resist it, and have the question tried?

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And if a private trustee may be subject to such a duty, and impelled by it to such action, how is it possible to maintain that he who is a trustee for the people of powers confided to him for their protection, for their security, for their benefit, may not, in that character of trustee, defend what has thus been confided to him?

Do not let me be misunderstood on this subject. I am not intending to advance upon or occupy any extreme ground, because no such extreme ground has been advanced upon or occupied by the President of the United States. He is to take care that the laws are faithfully executed. When a law has been passed through the forms of legislation, either with his assent or without his assent, it is his duty to see that that law is faithfully executed, so long as nothing is required of him but ministerial action. He is not to erect himself into a judicial court, and decide that the law is unconstitutional, and that therefore he will not execute it, for, if that were done, manifestly there never could be a judicial decision. He would not only veto a law, but he would refuse all action under the law after it had been passed, and thus prevent any judicial decision from being made. He asserts no such power. He has no such idea of his duty. His idea of his duty is that, if a law is passed over his veto which he believes to be unconstitutional, and that law affects the interests of third persons, those whose interests are affected must take care of them, vindicate them, raise questions concerning

them, if they should be so advised. If such a law affects the general and public interests of the people, the people must take care at the polls that it is remedied in a constitutional way.

But when, Senators, a question arises whether a particular law has cut off a power confided to him by the people, through the Constitution, and he alone can raise that question, and he alone can cause a judicial decision to come between the two branches of the Government to say which of them is right, and after due deliberation, with the advice of those who are his proper advisers, he settles down firmly upon the opinion that such is the character of the law, it remains to be decided by you whether there is any violation of his duty when he takes the needful steps to raise that question, and have it peacefully decided.

Where shall the line be drawn? Suppose a law should provide that the President of the United States should not make a treaty with England or with any other country. It would be a plain infraction of his constitutional power; and if an occasion arose when such a treaty was, in his judgment, expedient and necessary, it would be his duty to make it, and the fact that it should be declared to be a high misdemeanor if he made it would no more relieve him from the responsibility of acting through the fear of that law than he would be relieved of that responsibility by a bribe not to act.

Suppose a law that he shall not be Commander in Chief in part or in whole—a plain case, I will sup-

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pose, of an infraction of that provision of the Constitution which has confided to him that command; the Constitution intending that the head of all the military power of the country should be a civil magistrate, to the end that the law may always be superior to arms. Suppose he should resist a statute of that kind in the manner I have spoken of by bringing it to a judicial decision?

It may be said these are plain cases of express infractions of the Constitution; but what is the difference between a power conferred upon the President by the express words of the Constitution and a power conferred upon the President by a clear and sufficient implication in the Constitution? Where does the power to make banks come from? Where does the power come from to limit Congress in assigning original jurisdiction to the Supreme Court of the United States—one of the cases referred to the other day? Where do a multitude of powers upon which Congress acts come from in the Constitution except by fair implications? Whence do you derive the power, while you are limiting the tenure of office, to confer on the Senate the right to prevent removals without their consent? Is that expressly given in the Constitution, or is it an implication which is made from some of its provisions?

I submit it is impossible to draw any line of duty for the President, simply because a power is derived from an implication in the Constitution instead of from an express provision. One thing unquestion-

ably is to be expected of the President on all such occasions: that is, that he should carefully consider the question; that he should ascertain that it necessarily arises; that he should be of opinion that it is necessary to the public service that it should be decided; that he should take all competent and proper advice on the subject. When he has done all this, if he finds that he cannot allow the law to operate in the particular case without abandoning a power which he believes has been confided to him by the people, it is his solemn conviction that it is his duty to assert the power, and obtain a judicial decision thereon. And although he does not perceive, nor do his counsel perceive, that it is essential to his defense in this case to maintain this part of the argument, nevertheless, if this tribunal should be of that opinion, then, before this tribunal, before all the people of the United States, and before the civilized world, he asserts the truth of this position.

I am compelled now to ask your attention, quite briefly, however, to some considerations which weighed upon the mind of the President, and led him to the conclusion that this was one of the powers of his office which it was his duty, in the manner I have indicated, to endeavor to preserve. The question whether the Constitution has lodged the power of removal with the President alone, with the President and Senate, or left it to Congress to be determined at its will in fixing the tenure of offices, was, as all Senators know, debated in 1789 with surpassing abil-

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ity and knowledge of the frame and necessities of our Government. Now, it is a rule long settled, existing, I suppose, in all civilized countries—certainly in every system of law that I have any acquaintance with—that a contemporary exposition of a law made by those who were competent to give it a construction is of very great weight; and that, when such contemporary exposition has been made of a law, and it has been followed by an actual and practical construction in accordance with that contemporary exposition, continued during a long period of time, and applied to great numbers of cases, it is afterwards too late to call in question the correctness of such a construction. The rule is laid down, in the quaint language of Lord Coke, in this form:

Great regard ought, in construing a law, to be paid to the construction which the sages who lived about the time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time when the law was made. *Contemporanea expositio est fortissima in lege.*

I desire to bring before the Senate in this connection, inasmuch as I think the subject has been frequently misunderstood, the form taken by that debate of 1789, and the result which was attained. In order to do so, and at the same time to avoid fatiguing your attention by looking minutely into the debate itself, I beg leave to read a passage from Chief Justice Marshall's *Life of Washington*, where he has

summed up the whole. The writer says, on page 162 of the second volume of the Philadelphia edition:

After an ardent discussion, which consumed several days, the committee divided, and the amendment was negatived by a majority of thirty-four to twenty. The opinion thus expressed by the House of Representatives did not explicitly convey their sense of the Constitution. Indeed, the express grant of the power to the President rather implied a right in the Legislature to give or withhold it at their discretion. To obviate any misunderstanding of the principle on which the question had been decided, Mr. Benson moved in the House, when the report of the committee of the whole was taken up, to amend the second clause in the bill so as clearly to imply the power of removal to be solely in the President. He gave notice, that, if he should succeed in this, he would move to strike out the words which had been the subject of debate. If those words continued, he said, the power of removal by the President might hereafter appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was by fair construction fixed in the Constitution. The motion was seconded by Mr. Madison, and both amendments were adopted. As the bill passed into a law, it has ever been considered as a full expression of the sense of the Legislature on this important part of the American Constitution.

Some allusion has been made to the fact that this law was passed in the Senate only by the casting vote of the Vice President; and upon that subject I beg

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leave to refer to the life of Mr. Adams, by his grandson, volume 1 of his works, pages 448 to 450. He here gives an account, so far as could be ascertained from the papers of President Adams, of what that debate was, and finally terminates the subject in this way:

These reasons [that is, the reasons of Vice President Adams] were not committed to paper, however, and can therefore never be known; but in their soundness it is certain that he never had the shadow of a doubt.

I desire leave, also, to refer on this subject to the first volume of Story's Commentaries on the Constitution, section 408, in support of the rule of interpretation which I have stated to the Senate. It will there be found that it is stated by the learned commentator that a contemporaneous construction of the Constitution, made under certain circumstances, which he describes, is of very great weight in determining its meaning. He says:

After all, the most unexceptionable source of collateral interpretation is from the practical exposition of the Government itself in its various departments upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions, and have the same general recommendation that belongs to the latter. They are decided upon solid argument, *pro re nata*, upon a doubt raised, upon a *lis mota*, upon a deep sense of their importance and difficulty, in the face of the nation, with a view to

present action in the midst of jealous interests, and by men capable of urging or repelling the grounds of argument from their exquisite genius, their comprehensive learning, or their deep meditation upon the absorbing topic. How light, compared with these means of instruction, are the private lucubrations of the closet or the retired speculations of ingenious minds, intent on theory or general views, and unused to encounter a practical difficulty at every step!

On comparing the decision made in 1789 with the tests which are here suggested by the learned commentator, it will be found, in the first place, that the precise question was under discussion; secondly, that there was a deep sense of its importance, for it was seen that the decision was not to affect a few cases lying here and there in the course of the Government, but that it would enter deeply into its practical and daily administration; and in the next place, the determination was, so far as such determination could be entertained, thereby to fix a system for the future; and in the last place, the men who participated in it must be admitted to have been exceedingly well qualified for their work.

There is another rule to be added to this which is also one of very frequent application, and it is that a long-continued practical application of a decision of this character by those to whom the execution of a law is confided is of decisive weight. To borrow again from Lord Coke on this subject: "*Optimus legum interpretres consuetudo*"—"Practice is the best interpreter of law." Now, what followed this original decision?

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From 1789 down to 1867, every President and every Congress participated in and acted under the construction given in 1789. Not only did the Government so conduct, but it was a subject sufficiently discussed among the people to bring to their consideration that such a question had existed, had been started, had been settled in this manner, had been raised again from time to time, and yet, as everybody knows, so far from the people interfering with this decision, so far from ever expressing in any manner their disapprobation of the practice which had grown up under it, not one party nor two parties, but all parties, favored and acted upon this system of government. . . .

This is a subject which has been heretofore examined and passed upon judicially in very numerous cases. I do not speak now, of course, of judicial decisions of this particular question which is under consideration, whether the Constitution has lodged the power of removal in the President alone, or in the President and Senate, or has left it to be a part of the legislative power; but I speak of the judicial exposition of the effect of such a practical construction of the Constitution of the United States, originated in the way in which this was originated, continued in the way in which this was continued, and sanctioned in the way in which this has been sanctioned.

There was a very early case that arose soon after the organization of the Government, and which is

reported under the name of *Stuart v. Laird*, in 1 Cranch, 299. It was a question concerning the interpretation of the Constitution in relation to the power which the Congress had to assign to the judges of the Supreme Court circuit duties. From that time down to the decision in the case of *Cooley v. Port Wardens of Philadelphia*, reported in 12 Howard, 315—a period of more than half a century—there has been a series of decisions upon the effect of such a contemporaneous construction of the Constitution, followed by such a practice in accordance with it; and it is now a fixed and settled rule, which I think no lawyer will undertake to controvert, that the effect of such a construction is not merely to give weight to an argument, but to fix an interpretation. And accordingly it will be found, by looking into the books written by those who were conversant with this subject, that they have so considered and received it.

I beg leave to refer to the most eminent of all the commentators on American law, and to read a line or two from Chancellor Kent's *Lectures*, found in the first volume, page 310, marginal paging. After considering this subject, and, it should be noted in reference to this very learned and experienced jurist, considering it in an unfavorable light, because he himself thought that, as an original question, it had better have been settled the other way; that it would have been more logical, more in conformity with his views of what the practical needs of the Government were, that the Senate should participate with the

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President in the power of removal; nevertheless, he sums it all up in these words:

This amounted to a legislative construction of the Constitution, and it has ever since been acquiesced in and acted upon as of decisive authority in the case. It applies equally to every other officer of the Government, appointed by the President and Senate, whose term of duration is not specially declared. It is supported by the weighty reason that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faithful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it.

This, I believe, will be found to be a fair expression of the opinions of those who have had occasion to examine this subject in their closets as a matter of speculation. In this case, however, the President of the United States had to consider, not merely the general question where this power was lodged,—not merely the effect of this decision made in 1789, and the practice of the Government under it since,—but he had to consider a particular law, the provisions of which were before him, and might have an application to the case upon which he felt called upon to act; and it is necessary, in order to do justice to the President in reference to this matter, to see what the

theory of that law is, and what its operation is or must be, if any, upon the case which he had before him, namely, the case of Mr. Stanton.

During the debate in 1789 there were three distinct theories held by different persons in the House of Representatives. One was that the Constitution had lodged the power of removal with the President alone; another was that the Constitution had lodged that power with the President acting with the advice and consent of the Senate; the third was that the Constitution had lodged it nowhere, but had left it to the legislative power, to be acted upon in connection with the prescription of the tenure of office. The last of these theories was at that day held by comparatively few persons. The first two received not only much the greater number of votes, but much the greater weight of reasoning in the course of that debate; so much so that, when this subject came under the consideration of the Supreme Court of the United States, in the case of *ex parte Hennis*, collaterally only, Mr. Justice Thompson, who delivered the opinion of the court on that occasion, says that it has never been doubted that the Constitution had lodged the power either in the President alone or in the President and Senate,—certainly an inaccuracy; but then it required a very close scrutiny of the debates, and a careful examination of the few individual opinions expressed in that debate, in that direction, to ascertain that it ever had been doubted that, one way or the other, the Constitution settled the question.

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Nevertheless, as I understand it,—I may be mistaken in this, but as I understand it,—it is the theory of this law, which the President had before him, that both these opinions were wrong; that the Constitution has not lodged the power anywhere; that it has left it as an incident to the legislative power, which incident may be controlled, of course, by the Legislature itself, according to its own will, because, as Chief Justice Marshall somewhere remarks (and it is one of those profound remarks which will be found to have been carried by him into many of his decisions), when it comes to a question whether a power exists the particular mode in which it may be exercised must be left to the will of the body that possesses it; and therefore, if this be a legislative power, it was very apparent to the President of the United States, as it had been very apparent to Mr. Madison, as was declared by him in the course of his correspondence with Mr. Coles, which is, no doubt, familiar to Senators, that, if this be a legislative power, the Legislature may lodge it in the Senate, may retain it in the whole body of Congress, or may give it to the House of Representatives.

I repeat, the President had to consider this particular law; and that, as I understand it, is the theory of that law. I do not undertake to say it is an unfounded theory, I do not undertake to say that it may not be maintained successfully, but I do undertake to say that it is one which was originally rejected by the ablest minds that had this subject under con-

sideration in 1789; that, whenever the question has been started since, it has had, to a recent period, very few advocates, and that no fair and candid mind can deny that it is capable of being doubted and disbelieved after examination. It may be the truth, after all; but it is not a truth which shines with such clear and certain light that a man is guilty of a crime because he does not see it.

The President not only had to consider this particular law, but he had to consider its constitutional application to this particular case, supposing the case of Mr. Stanton to be, what I have endeavored to argue it was not, within its terms. Let us assume, then, that his case was within its terms. Let us assume that this proviso, in describing the cases of Secretaries, described the case of Mr. Stanton; that Mr. Stanton, having been appointed by President Lincoln in January, 1862, and commissioned to hold during the pleasure of the President, by force of this law acquired a right to hold this office against the will of the President down to April, 1869.

Now, there is one thing which has never been doubted under the Constitution—is incapable of being doubted, allow me to say—and that is, that the President is to make the choice of officers. Whether, having made the choice, and they being inducted into office, they can be removed by him alone, is another question. But to the President alone is confided the power of choice. In the first place, he alone can nominate. When the Senate has

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advised the nomination, consented to the nomination, he is not bound to commission the officer. He has a second opportunity for consideration, and acceptance or rejection of the choice he had originally made. On this subject allow me to read from the opinion of Chief Justice Marshall in the case of *Marbury v. Madison*, where it is expressed more clearly than I can express it. After enumerating the different clauses of the Constitution which bear upon this subject, he says:

These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations: (1) The nomination. This is the sole act of the President, and is completely voluntary. (2) The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate. (3) The commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

He then goes into various considerations to show that it is not a duty enjoined by the Constitution; that it is optional with him whether he will commission even after an appointment has been confirmed, and he says:

The last act to be done by the President is the signature of the commission. He has then acted on the advice and

consent of the Senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination,] has been made, and the officer is appointed.

The choice, then, is with the President. The action of the Senate upon that choice is an advisory action only at a particular stage after the nomination, before the appointment or the commission. Now, as I have said before, Mr. Stanton was appointed under the law of 1789, constituting the War Department, and in accordance with that law he was commissioned to hold during the pleasure of the President. President Lincoln had said to the Senate: "I nominate Mr. Stanton to hold the office of Secretary for the Department of War during the pleasure of the President." The Senate had said: "We assent to Mr. Stanton's holding the office of Secretary for the Department of War during the pleasure of the President." What does this tenure-of-office law say, if it operates on the case of Mr. Stanton? It says Mr. Stanton shall hold office against the will of the President, contrary to the terms of his commission, contrary to the law under which he was appointed, down to the 4th of April, 1869. For this new, fixed, and extended term, where is Mr. Stanton's commission? Who has made the appointment? Who has assented to it? It is a legislative commission; it is a legislative appointment; it is assented to by Congress acting in its legislative capacity. The President has had no

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voice in the matter. The Senate as the adviser of the President has had no voice in the matter. If he holds at all, he holds by force of legislation, and not by any choice made by the President, or assented to by the Senate. And this was the case, and the only case, which the President had before him, and on which he was called to act.

Now, I ask Senators to consider whether, for having formed an opinion that the Constitution of the United States had lodged this power with the President—an opinion which he shares with every President who has preceded him, with every Congress which has preceded the last; an opinion formed on the grounds which I have imperfectly indicated; an opinion which, when applied to this particular case, raises the difficulties which I have indicated here, arising out of the fact that this law does not pursue either of the opinions which were originally held in this Government, and have occasionally been started and maintained by those who are restless under its administration; an opinion thus supported by the practice of the Government from its origin down to his own day—is he to be impeached for holding that opinion? If not, if he might honestly and properly form such an opinion under the lights which he had, and with the aid of the advice which we shall show you he received, then is he to be impeached for acting upon it to the extent of obtaining a judicial decision whether the executive department of the Government was right in its opinion, or the legislative department was right

in its opinion? Strangely enough, as it struck me, the honorable managers themselves say: "No; he is not to be impeached for that." I beg leave to read a passage from the argument of the honorable manager by whom the prosecution was opened:

If the President had really desired solely to test the constitutionality of the law, or his legal right to remove Mr. Stanton, instead of his defiant message to the Senate on the 21st of February, informing them of the removal, but not suggesting this purpose, which is thus shown to be an afterthought, he would have said, in substance: "Gentlemen of the Senate, in order to test the constitutionality of the law entitled, 'An act regulating the tenure of certain civil offices,' which I verily believe to be unconstitutional and void, I have issued an order of removal of E. M. Stanton from the office of Secretary of the Department of War. I felt myself constrained to make this removal lest Mr. Stanton should answer the information in the nature of a *quo warranto*, which I intend the Attorney General shall file at an early day, by saying that he holds the office of Secretary of War by the appointment and authority of Mr. Lincoln, which has never been revoked. Anxious that there shall be no collision or disagreement between the several departments of the Government and the Executive, I lay before the Senate this message, that the reasons for my action, as well as the action itself, for the purpose indicated, may meet your concurrence."

Thus far are marks of quotation showing the communication which the President should have obtained

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from the honorable manager, and sent to the Senate in order to make this matter exactly right. Then follows this:

Had the Senate received such a message, the Representatives of the people might never have deemed it necessary to impeach the President for such an act to insure the safety of the country, even if they had denied the accuracy of his legal position.

So that it seems that it is, after all, not the removal of Mr. Stanton, but the manner in which the President communicated the fact of that removal to the Senate after it was made. That manner is here called the "defiant message" of the 21st of February. That is a question of taste. I have read the message, as you all have read it. If you can find anything in it but what is decorous and respectful to this body and to all concerned your taste will differ from mine. But whether it be a point of manners well or ill taken, one thing seems to be quite clear: that the President is not impeached here because he entertained an opinion that this law was unconstitutional; he is not impeached here because he acted on that opinion, and removed Mr. Stanton; but he is impeached here because the House of Representatives considers that this honorable body was addressed by a "defiant message," when it should have been addressed in the terms which the honorable manager has dictated.

I now come, Mr. Chief Justice and Senators, to another topic connected with this matter of the re-

removal of Mr. Stanton, and the action of the President under this law. The honorable managers take the ground, among others, that whether, upon a true construction of this tenure-of-office act, Mr. Stanton be within it, or, even if you should believe that the President thought the law unconstitutional, and had a right, if not trammelled in some way, to try that question, still by his own conduct and declarations the President, as they phrase it, is estopped. He is not to be permitted here to assert the true interpretation of this law; he is not to be permitted to allege that his purpose was to raise a question concerning its constitutionality, and the reason is that he has done and said certain things.

All of us who have read law books know that there is in the common law a doctrine called "rules of estoppel," founded, undoubtedly, on good reason, although, as they are called from the time of Lord Coke, or even earlier, down to the present day, odious, because they shut out the truth. Nevertheless, there are circumstances when it is proper that the truth should be shut out. What are the circumstances? They are where a question of private right is involved, where on a matter of fact that private right depends, and where one of the parties to the controversy has so conducted himself that he ought not, in good conscience, to be allowed either to assert or deny that matter of fact. But did any one ever hear of an estoppel on a matter of law? Did any one ever hear that a party had put himself into such a condition

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that, when he came into a court of justice, even to claim a private right, he could not ask the judge correctly to construe a statute, and insist on the construction when it was arrived at in his favor? Did anybody ever hear, last of all, that a man was convicted of crime by reason of an estoppel under any system of law that ever prevailed in any civilized state?

That the President of the United States should be impeached and removed from office, not by reason of the truth of his case, but because he is estopped from telling it, would be a spectacle for gods and men. Undoubtedly it would have a place in history which it is not necessary for me to attempt to foreshadow. There is no matter of fact here. They have themselves put in Mr. Stanton's commission, which shows the date of the commission and the terms of the commission, and that is the whole matter of fact which is involved. The rest is the construction of the tenure-of-office act, and the application of it to the case, which they have thus made themselves; and also the construction of the Constitution of the United States, and the abstract public question whether that has lodged the power of removal with the President alone, or with the President and Senate, or left it to Congress.

I respectfully submit, therefore, that the ground is untenable that there can be an estoppel by any conduct of the President, who comes here to assert, not a private right, but a great public right, confided

to the office by the people, in which, if anybody is estopped, the people will be estopped. The President never could do or say anything which would put this great public right into that extraordinary predicament. But what has he done? What are the facts upon which they rely, out of which to work this estoppel, as they call it? In the first place, he sent a message to the Senate on the 12th of December, 1867, in which he informed the Senate that he had suspended Mr. Stanton by a certain order, a copy of which he gave; that he had appointed General Grant to exercise the duties of the office *ad interim* by a certain other order, a copy of which he gave; and then he entered into a discussion, in which he showed the existence of this question, whether Mr. Stanton was within the tenure-of-office bill; the existence of the other question, whether this was or was not a constitutional law; and then he invoked the action of the Senate. There was nothing misrepresented. There was nothing concealed which he was bound to state.

It is complained of by the honorable managers that he did not tell the Senate that, if their action should be such as to restore Mr. Stanton practically to the possession of the office, he should go to law about it. That is the complaint—that he did not tell that to the Senate. It may have been a possible omission, though I rather think not. I rather think that that good taste which is so prevalent among the managers, and which they so insist upon here, would hardly dic-

tate that the President should have held out to the Senate something which might possibly have been construed into a threat upon that subject. He laid the case before the Senate for its action; and now, forsooth, they say he was too deferential to this law, both by reason of this conduct of his, and also what he did upon other occasions, to which I shall presently advert.

Senators, there is no inconsistency in the President's position or conduct in reference to this matter. Suppose this case: A party who has a private right in question submits to the same tribunal in the same proceeding these questions: First, I deny the constitutionality of the law under which the right is claimed against me; second, I assert that the true interpretation of that law will not affect this right which is claimed against me; third, I insist that, even if it is within the law, I make a case within the law. Is there any inconsistency in that? Is not that done every day, or something analogous to it, in courts of justice? And where was the inconsistency on this occasion? Suppose the President had summed up the message which he sent to the Senate in this way: "Gentlemen of the Senate, I insist, in the first place, that this law is unconstitutional. I insist, in the second place, that Mr. Stanton is not within it. I respectfully submit for your consideration whether, if it be a constitutional law, and Mr. Stanton's case be within it, the facts which I present to you do not make such a case that you will not advise me to receive him back into office."

Suppose he had summed up in that way, would there have been any inconsistency then?

And why is not the substance of that found in this message? Here it is pointed out that the question existed whether the law was unconstitutional; here it is pointed out that the question existed whether Mr. Stanton was within the law; and then the President goes on to submit for the consideration of the Senate, whom he had reason to believe, and did believe, thought the law was constitutional, though he had no reason to believe that they thought Mr. Stanton was within the law, the facts to be acted upon within the law, if the case was there.

It seems the President has not only been thus anxious to avoid a collision with this law; he has not only, on this occasion, taken this means to avoid it, but it seems that he has actually, in some particulars, obeyed the law; he has made changes in the commissions, or, rather, they have been made in the departments, and, as he has signed the commissions, I suppose they must be taken, although his attention does not appear to have been called to the subject at all, to have been made with his sanction, just so far, and because he sanctions that which is done by his Secretaries, if he does not interfere actively to prevent it. He has done not merely this, but he has also in several cases—four cases, three collectors and one consul, I think they are—sent into the Senate notice of suspension—notice that he had acted under this law, and suspended these officers.

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This objection proceeds upon an entire misapprehension of the position of the President, and of the views which he has of his own duty. It assumes that because, when the emergency comes, as it did come in the case of Mr. Stanton, when he must act or else abandon a power which he finds in the particular instance it is necessary for him to insist upon in order to carry on the Government,—that, because he holds that opinion, he must run amuck against the law, and take every possible opportunity to give it a blow, if he can. He holds no such opinion. So long as it is a question of administrative duty merely, he holds that he is bound to obey the law. It is only when the emergency arises; when the question is put to him so that he must answer it: “Can you carry on this department of the Government any longer in this way? No. Have you power to carry it on as the public service demands? I believe I have.” Then comes the question how he shall act. But whether a consul is to be suspended or removed, whether a defaulting collector is to be suspended or removed, does not involve the execution of the great powers of the Government. It may be carried on; he may be of opinion with less advantage, he may be of opinion not in accordance with the requirements of the Constitution, but it may be carried on without serious embarrassment or difficulty. Until that question is settled, he does not find it necessary to make it,—settled in some way, by some person who has an interest to raise and have it settled.

Classics of the Bar

I wish to observe, also (the correctness of which observation I think the Senate will agree with), that these changes which have been made in the forms of the commissions really have nothing to do with this subject. For instance, the change is made in the Department of State, "subject to the conditions prescribed by law." That is the tenure on which I think all commissions should originally have run, and ought to continue to run. It is general enough to embrace all. If it is a condition prescribed by law that the Senate must consent to the removal of the incumbent before he is rightfully out of office, it covers that case. If the tenure-of-office bill be not a law of the land because it is not in accordance with the Constitution, it covers that case. It covers every case necessarily from its terms, for every officer does and should and must hold subject to the conditions prescribed by law—not necessarily a law of Congress, but a law of the land, the Constitution being supreme in that particular.

There is another observation, also, and that is, that the change that was made in the Department of the Treasury—"until a successor be appointed and qualified"—has manifestly nothing whatever to do with the subject of removal. Whether the power of removal be vested in the President alone, or vested in the President by and with the advice and consent of the Senate, this clause does not touch it. It is just as inconsistent with removal by the President with the consent of the Senate as it is inconsistent with the

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removal by the President alone. In other words, it is the general tenure of the office which is described, according to which the officer is to continue to hold; but he and all other officers hold subject to some power of removal vested somewhere, and this change which has been made in the commission does not declare where it is vested, nor has it any influence on the question in whom it is vested.

I wish to add to this that there is nothing, so far as I see, on this subject of estoppel, growing out of the action of the President, either in sending the message to the Senate of the 12th of December, or in the changes in the commissions, or in his sending to the Senate notices of suspensions of different officers, which has any bearing whatever upon the tenure-of-office act as affecting the case of Mr. Stanton. That is a case that stands by itself. The law may be a constitutional law. It may not only be a law under which the President has acted in this instance, but under which he is bound to act, and is willing to act, if you please, in every instance. Still, if Mr. Stanton is not within that law, the case remains as it was originally presented, and that case is that, not being within that law, the first article is entirely without foundation.

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Mr. Chief Justice and Senators, among the points which I accidentally omitted to notice yesterday was one which seems to me of sufficient importance to return, and for a few moments to ask the attention

of the Senate, to it. It will best be exhibited by reading from Saturday's proceedings a short passage. In the course of those proceedings Mr. Manager Butler said:

It will be seen, therefore, Mr. President and Senators, that the President of the United States says in his answer that he suspended Mr. Stanton, under the Constitution, indefinitely, and at his pleasure. I propose, now, unless it be objected to, to show that that is false under his own hand, and I have his letter to that effect, which, if there is no objection, I will read, the signature of which was identified by C. E. Creecy.

Then followed the reading of the letter, which was this:

Executive Mansion,
Washington, D. C., August 14, 1867.

Sir: In compliance with the requirements of the eighth section of the act of Congress of March 2, 1867, entitled, "An act regulating the tenure of certain civil offices," you are hereby notified that, on the 12th instant, Hon. Edwin M. Stanton was suspended from office as Secretary of War, and General Ulysses S. Grant authorized and empowered to act as Secretary of War *ad interim*.

I am, sir, very respectfully yours,
Andrew Johnson.

This is the letter which was to show, under the hand of the President, that, when he said in his answer he did not suspend Mr. Stanton by virtue of the tenure-of-office act, that statement was a false-

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hood. Allow me now to read the eighth section of that act:

That whenever the President shall, without the advice and consent of the Senate, designate, authorize, or employ any person to perform the duties of any office, he shall forthwith notify the Secretary of the Treasury thereof; and it shall be the duty of the Secretary of the Treasury thereupon to communicate such notice to all the proper accounting and disbursing officers of his department.

The Senate will perceive that this section has nothing to do with the suspension of an officer, and no description of what suspensions are to take place; but the purpose of the section is that if, in any case, the President, without the advice and consent of the Senate, shall, under any circumstances, designate a third person to perform temporarily the duties of an office, he is to make a report of that designation to the Secretary of the Treasury, and that officer is to give the necessary information of the event to his subordinate officers. The section applies in terms to and includes all cases. It applies to and includes cases of designation on account of sickness or absence or resignation, or any cause of vacancy, whether temporary or permanent, and whether occurring by reason of a suspension or of a removal from office; and therefore, when the President says to the Secretary of the Treasury, "I give you notice that I have designated General Grant to perform the duties *ad interim* of Secretary of War," he makes no allusion, by force

of that letter, to the manner in which that vacancy has occurred, or the authority by which it has been created; and hence, instead of this letter showing, under the President's own hand, that he had stated a falsehood, it has no reference to the subject-matter of the power or the occasion of Mr. Stanton's removal.

[MR. BUTLER:] Read the second section, please,—the first clause of it.

[MR. CURTIS:] What did the manager call for?

[MR. BUTLER:] Read the first clause of the second section of the act, which says that in no other case except when he suspends shall he appoint.

[MR. CURTIS:] The second section provides:

“That when any officer appointed as aforesaid, excepting judges of the United States Courts, shall, during a recess of the Senate, be shown by satisfactory evidence,” and so forth.

The President is allowed to suspend such an officer. Now, the President states in his answer that he did not act under that section.

[MR. BUTLER:] That is not reading the section; that is not what I desired.

[MR. CURTIS:] I am aware that is not reading the section, Mr. Manager. You need not point that out. It is a very long section, and I do not propose to read it.

[MR. BUTLER:] The first half a dozen lines.

[MR. CURTIS:] This second section authorizes the President to suspend in cases of crime and other cases

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which are described in this section. By force of it the President may suspend an officer. This eighth section applies to all cases of temporary designations and appointments, whether resulting from suspensions under the second section, or whether arising from temporary absence, or sickness, or death, or resignation. No matter what the cause may be, if, for any reason, there is a temporary designation of a person to supply an office *ad interim*, notice is to be given to the Secretary of the Treasury; and therefore I repeat, Senators, that the subject-matter of this eighth section, and the letter which the President wrote in consequence of it, have no reference to the question under what authority he suspended Mr. Stanton.

I now ask the attention of the Senate to the second article in the series; and I will begin, as I began before, by stating what the substance of this article is, what allegations it makes, so as to be the subjects of proof, and then the Senate will be prepared to see how far each one of these allegations is supported by what is already in the case, and I shall be enabled to state what we propose to offer by way of proof in respect to each of them. The substantive allegations of this second article are that the delivery of the letter of authority to General Thomas was without authority of law; that it was an intentional violation of the tenure-of-office act; that it was an intentional violation of the Constitution of the United States; that the delivery of this order to General Thomas was made with intent to violate both the act and the Con-

stitution of the United States. That is the substance of the second article. The Senate will at once perceive that, if the suspension of Mr. Stanton was not a violation of the tenure-of-office act in point of fact, or, to state it in other terms, if the case of Mr. Stanton is not within the act, then his removal, if he had been removed, could not be a violation of the act. If his case is not within the act at all—if the act does not apply to the case of Mr. Stanton—of course his removal is not a violation of that act.

If Mr. Stanton continued to hold under the commission which he received from President Lincoln, and his tenure continued to be under the act of 1789, and under his only commission, which was at the pleasure of the President, it was no violation of the tenure-of-office act for Mr. Johnson to remove, or attempt to remove, Mr. Stanton; and therefore the Senate will perceive that it is necessary to come back again—to recur under this article, as it will be necessary to recur under the whole of the first eight articles—to the inquiries, first, whether Mr. Stanton's case was within the tenure-of-office act; and, secondly, whether it was so clearly and plainly within that act that it can be attributed to the President as a high misdemeanor that he construed it not to include his case. But suppose the case of Mr. Stanton is within the tenure-of-office act, still the inquiry arises whether what was done in delivering this letter of authority to General Thomas was a violation of that act; and that renders it necessary that I should ask your care-

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ful attention to the general subject-matter of this act, and the particular provisions which are inserted in it in reference to each of those subjects.

Senators will recollect, undoubtedly, that this law, as it was finally passed, differs from the bill as it was originally introduced. The law relates to two distinct subjects. One is removal from office; the other subject is appointments of a certain character, made under certain circumstances, to fill offices. It seems that a practice had grown up under the Government that, where a person was nominated to the Senate to fill an office, and the Senate either did not act on his nomination during their session, or rejected the nomination, after the adjournment of the Senate, and in the recess, it was considered competent for the President, by a temporary commission, to appoint that same person to that same office, and that was deemed by many Senators—unquestionably by a majority, and I should judge, from reading the debates, by a large majority, of the Senate—to be an abuse of power,—not an intentional abuse. But it was a practice which had prevailed under the Government to a very considerable extent. It was not limited to very recent times. It had been supported by the opinions of different Attorneys General given to different Presidents. But still it was considered by many Senators to be a departure from the spirit of the Constitution, and a substantial derogation from the just power of the Senate in respect to nominations for office. That being so, it will be found, on an ex-

amination of this law, that the first and second sections of the act relate exclusively to removals from office and temporary suspensions in the recess of the Senate; while the third section and several of the following sections, to which I shall ask your particular attention, relate exclusively to this other subject of appointments made to office after the Senate had refused to concur in the nomination of the person appointed. Allow me now to read from the third section:

That the President shall have power to fill all vacancies which may happen during the recess of the Senate, by reason of death or resignation—

I pause here to remark that this does not include all cases. It does not include any case of the expiration of a commission. It includes simply death and resignation; not cases of the expiration of a commission during the recess of the Senate. Why these were thus omitted I do not know; but it is manifest that the law does not affect to, and in point of fact does not, cover all cases which might arise belonging to this general class to which this section was designed to refer. The law goes on to say:

That the President shall have power to fill all vacancies which may happen during the recess of the Senate by reason of death or resignation, by granting commissions which shall expire at the end of their next session thereafter; and if no appointment, by and with the advice and consent of the Senate, shall be made to such office so vacant or temporarily filled as aforesaid during such next session of

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the Senate, such office shall remain in abeyance, without any salary, fees, or emoluments attached thereto, until the same shall be filled by appointment thereto, by and with the advice and consent of the Senate, and, during such time, all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office.

Here all the described vacancies in office occurring during the recess of the Senate, and the failure to fill those vacancies in accordance with the advice of the Senate, are treated as occasioning an abeyance of such offices. That applies, as I have said, to two classes of cases: vacancies happening by reason of death or resignation. It does not apply to any other vacancies.

The next section of this law does not relate to this subject of filling offices, but to the subject of removals:

That nothing in this act contained shall be construed to extend the term of any office the duration of which is limited by law.

The fifth section is:

That if any person shall, contrary to the provisions of this act, accept any appointment to or employment in any office, or shall hold or exercise, or attempt to hold or exercise, any such office or employment, he shall be deemed, and is hereby declared to be, guilty of a high misdemeanor, and, upon trial and conviction thereof, he shall be punished

therefor by a fine not exceeding \$10,000, or by imprisonment,
and so forth.

Any person who shall, "contrary to the provisions of this act," accept any appointment. What are the "provisions of this act" in respect to accepting any appointment? They are found in the third section of the act, putting certain offices in abeyance under the circumstances which are described in that section. If any person does accept an office which is thus put into abeyance, or any employment or authority in respect to such office, he comes within the penal provisions of the fifth section; but outside of that there is no such thing as accepting an office contrary to the provisions of the act, because the provisions of the act in respect to filling offices extend no further than to these cases. And so, in the next section it is declared:

That every removal, appointment, or employment made, had, or exercised, contrary to the provisions of this act, and the making, signing, sealing, countersigning, or issuing of any commission or letter of authority for or in respect to any such appointment or employment, shall be deemed, and are hereby declared to be, high misdemeanors,
and so forth.

Here, again, the making of a letter of authority contrary to the provisions of the act can refer only to those cases which the act itself has described, which the act itself has prohibited, and any other cases

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which are outside of such prohibition, as this case manifestly is, do not come within its provisions. The stress of this article, however, does not seem to me to depend at all upon this question of the construction of this law, but upon a totally different matter, which I agree should be fairly and carefully considered: The important allegation of the article is that this letter of authority was given to General Thomas, enabling him to perform the duties of Secretary of War *ad interim* without authority of law. That I conceive to be the main inquiry which arises under this article, provided the case of Mr. Stanton and his removal are within the tenure-of-office bill at all.

I wish first to bring to the attention of the Senate the act of 1795, which is found in 1 Statutes at Large, page 415. It is a short act, and I will read the whole of it:

That, in case of vacancy in the office of Secretary of State, Secretary of the Treasury, or of the Secretary of the Department of War, or of any officer of either of the said Departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed or such vacancies be filled; provided, that no one vacancy shall be supplied, in manner aforesaid, for a longer term than six months.

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This act, it has been suggested, may have been repealed by the act of February 20, 1863, which is found in 12 Statutes at Large, page 656. This also is a short act, and I will trespass on the patience of the Senate by reading it:

That, in case of the death, resignation, absence from the seat of Government, or sickness of the head of any executive department of the Government, or of any officer of either of the said departments whose appointment is not in the head thereof, whereby they cannot perform the duties of their respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize the head of any other executive department, or other officer in either of said departments whose appointment is vested in the President, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence or inability by sickness shall cease; provided, that no one vacancy shall be supplied in manner aforesaid for a longer term than six months.

These acts, as the Senate will perceive, although they may be said in some sense to relate to the same general subject-matter, contain very different provisions, and the later law contains no express repeal of the other. If, therefore, the later law operates as a repeal, it is only as a repeal by implication. It says in terms that "all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." That a general principle of law would say if the statute did not speak those words. The addi-

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tion of those words adds nothing to its repealing power. The same inquiry arises under them that would arise if they did not exist, namely, how far is this later law inconsistent with the provisions of the earlier law?

There are certain rules which I shall not fatigue the Senate by citing cases to prove, because every lawyer will recognize them as settled rules upon this subject. In the first place there is a rule that repeals by implication are not favored by the courts. This is, I understand it, because the courts act on the assumption or the principle that if the Legislature really intended to repeal the law, it would have said so. Not that it necessarily must say so, because there are repeals by implication; but the presumption is that, if the Legislature entertained a clear and fixed purpose to repeal a former law, it would be likely at least to have said so, and therefore the rule is a settled one that repeals by implication are not favored by the courts. Another rule is that the repugnancy between the two statutes must be clear. It is not enough that, under some circumstances, one may possibly be repugnant to the other. The repugnancy, as the language of the books is, between the two must be clear, and, if the two laws can stand together, the latter does not impliedly repeal the former. If Senators have any desire to recur to the authorities on this subject, they will find a sufficient number of them collected in Sedwick on Statute Law, page 126.

Now, there is no repugnancy whatsoever between these two laws that I can perceive. The act of 1795 applies to all vacancies, however created. The act of 1863 applies only to vacancies, temporary or otherwise, occasioned by death and resignation. Removals from office, expiration of commissions, are not included. The act of 1795 applies only to vacancies; the act of 1863 to temporary absences or sickness. The subject-matter, therefore, of the laws, is different. There is no inconsistency between them. They may stand together and operate upon the cases to which each applies; and therefore I submit that, in the strictest view which may ultimately be taken of this subject, it is not practicable to maintain that the later law repealed altogether the act of 1795. But whether it did or not, I state again what I have had so often occasion to repeat before: Is it not a fair question? Is it a crime to be on one side of that question, and not on the other? Is it a high misdemeanor to believe that a certain view taken of the repeal of this earlier law by the later one is a sound view? I submit that that would be altogether too stringent a rule, even for the honorable managers themselves to contend for; and they do not, and the House of Representatives does not, contend for any such rule. Their article alleges, as matter of fact, that there was a willful intention on the part of the President to issue this letter to General Thomas without authority of law; not on mistaken judgment, not upon an opinion which, after due consideration,

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lawyers might differ about, but by reason of a willful intention to act without authority, and that, I submit, from the nature of the case, cannot be made out.

The next allegation in this article to which I desire to invite the attention of the Senate is that the giving of this letter to General Thomas during the session of the Senate was a violation of the Constitution of the United States. That will require your attentive consideration.

The Constitution, as you are well aware, has provided for two modes of filling offices. The one is by temporary commissions, during the recess of the Senate, when the vacancy happens in the recess. The other is by appointment with the advice and consent of the Senate, followed by a commission from the President.

But it very early became apparent to those who administered the Government that cases must occur to which neither of those modes dictated by the Constitution would be applicable, but which must be provided for, cases of temporary absence of the head of a department, the business of which, especially during the session of Congress, must, for the public interest, continue to be administered; cases of sickness; cases of resignation or removal, for the power of removal, at any rate in that day, was held to be in the President; cases of resignation or removal in reference to which the President was not, owing to the suddenness of the occurrence, in a condition immediately to make a nomination to fill the office, or

even to issue a commission to fill the office, if such vacancy occurred in vacation.

And therefore it became necessary by legislation to supply these administrative defects which existed and were not provided for by the Constitution; and accordingly, beginning in 1792, there will be found to be a series of acts on this subject of filling vacancies by temporary or *ad interim* authority; not appointments, not filling vacancies in offices by a commission in the recess of the Senate, nor by a commission signed by the President in consequence of the advice and consent of the Senate, but a mode of designating a particular person to perform temporarily the duties of some particular office, which otherwise, before the office can be filled in accordance with the Constitution, would remain unperformed. These acts are one of May 8, 1792, §8, February 13, 1795, and, last, of February 20, 1863.

The Senate will observe what particular difficulty these laws were designed to meet. This difficulty was the occurrence of some sudden vacancy in office, or some sudden inability to perform the duties of an office; and the intention of each of these laws was, each being applied to some particular class of cases, to make provision that, notwithstanding there was a vacancy in the office, or notwithstanding there was a temporary disability in the officer without a vacancy, still the duties of the office should be temporarily discharged. That was the purpose of these laws.

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It is entirely evident that these temporary vacancies are just as liable to occur during the session of the Senate as during the recess of the Senate; that it is just as necessary to have a set of legislative provisions to enable the President to carry on the public service in case of these vacancies and inabilities during the session of the Senate as during the recess of the Senate; and, accordingly, it will be found, by looking into these laws, that they make no distinction between the sessions of the Senate and the recesses of the Senate in reference to these temporary authorities. "Whenever a vacancy shall occur" is the language of the law,—“whenever there shall be a death or a resignation or an absence or a sickness.” The law applies when the event occurs that the law contemplates as an emergency; and the particular time when it occurs is of no consequence in itself, and is deemed by the law of no consequence.

In accordance with this view, Senators, has been the uniform and settled and frequent practice of the Government from its very earliest date, as I am instructed we shall prove, not in any one or two or few instances, but in great numbers of instances. That has been the practical construction put upon these laws from the time when the earliest law was passed in 1792, and it has continued down to this day.

The honorable managers themselves read a list a few days since of temporary appointments during the session of the Senate of heads of departments, which amounted in number, if I counted them accurately,

to upwards of thirty, and, if you add to these the cases of officers below the heads of departments, the number will be found, of course, to be much increased; and, in the course of exhibiting this evidence, it will be found that, although the instances are not numerous, for they are not very likely to occur in practice, yet instances have occurred on all-fours with the one which is now before the Senate, where there has been a removal or a suspension of an officer, sometimes one and sometimes the other, and the designation of a person has been made at the same time temporarily to discharge the duties of that office. The Senate will see that, in practice, such things must naturally occur.

Take the case, for instance, of Mr. Floyd, which I alluded to yesterday. Mr. Floyd went out of office. His chief clerk was a person believed to be in sympathy with him, and under his control. If the third section of the act of 1789 was allowed to operate, the control of the office went into the hands of that clerk. The Senate was in session. The public safety did not permit the War Department to be left in that predicament for one hour, if it could be avoided, and President Buchanan sent down to the Post Office Department, and brought the Postmaster General to the War Department, and put it in his charge. There was then in this body a sufficient number of persons to look after that matter. They felt an interest in it, and consequently they passed a resolve inquiring of President Buchanan by what authority he had

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made an appointment of a person to take charge of the War Department without their consent, without a nomination to them, and their advising and consenting to it; to which a message was sent in answer containing the facts on this subject, and showing to the Senate of that day the propriety, the necessity, and the long-continued practice under which this authority was exercised by him, and giving a schedule running through the time of General Jackson and his two immediate successors, I think, showing great numbers of *ad interim* appointments of this character, and to those, as I have said, we shall add a very considerable number of others. I submit, then, that there can be no ground whatever for the allegation that this *ad interim* appointment was a violation of the Constitution of the United States. The legislation of Congress is a sufficient answer to that charge.

I pass, therefore, to the next article which I wish to consider, and that is not the next in number, but the eighth; and I take it in this order because the eighth article, as I have analyzed it, differs from the second one only in one particular, and therefore, taking that in connection with the second, of which I have just been speaking, it will be necessary for me to say but a few words concerning it. It charges an attempt unlawfully to control the appropriations made by Congress for the military service, and that is all there is in it except what there is in the second article. Upon that, certainly, at this stage of the case, I do not deem it necessary to make any observa-

tions. The Senate will remember the offer of proof on the part of the managers designed, as was stated, to connect the President of the United States, through his private secretary, with the treasury, and thus enable him to use unlawfully appropriations made for the military service. The Senate will recollect the fate of that offer, and that the evidence was not received; and therefore it seems to me quite unnecessary for me to pause to comment any further upon this eighth article.

I advance to the third article, and here the allegations are that the President appointed General Thomas; second, that he did this without the advice and consent of the Senate; third, that he did it when no vacancy had happened in the recess of the Senate; fourth, that he did it when there was no vacancy at the time of the appointment; and, fifth, that he committed a high misdemeanor by thus intentionally violating the Constitution of the United States. I desire to say a word or two upon each of these points.

And first, we deny that he ever appointed General Thomas to an office. An appointment can be made to an office only by the advice and consent of the Senate, and through a commission signed by the President, and bearing the great seal of the Government. That is the only mode in which an appointment can be made. The President, as I have said, may temporarily commission officers when vacancies occur during the recess of the Senate. That is not an appointment. It is not so termed in the Consti-

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tution. A clear distinction is drawn between the two. The President also may, under the acts of 1795 and 1863, designate persons who shall temporarily exercise the authority and perform the duties of a certain office when there is a vacancy; but that is not an appointment. The office is not filled by such a designation.

Now, all which the President did was to issue a letter of authority to General Thomas, authorizing him *ad interim* to perform the duties of Secretary of War. In no sense was this an appointment. It is said it was made without the advice and consent of the Senate. Certainly it was. How can the advice and consent of the Senate be obtained to an *ad interim* authority of this kind under any of these acts of Congress? It is not an appointment that is in view. It is to supply temporarily a defect in the administrative machinery of the Government. If he had gone to the Senate for their advice and consent, he must have gone on a nomination made by him of General Thomas to this office, a thing he never intended to do, and never made any attempt to carry into effect.

It is said no vacancy happened in the recess. That I have already considered. Temporary appointments are not limited to the temporary supply of vacancies happening in the recess of the Senate, as I have already endeavored to show.

It is said there was no vacancy at the time the act was done. That is begging the question. If Mr.

Stanton's case was not within the tenure-of-office act,—if, as I have so often repeated, he held under the act of 1789, and at the pleasure of the President,—the moment he received that order which General Thomas carried to him there was a vacancy in point of law, however he may have refused to perform his duty, and prevented a vacancy from occurring in point of fact.

But the Senate will perceive these two letters were to be delivered to General Thomas at the same time. One of them is an order to Mr. Stanton to vacate the office; the other is a direction to General Thomas to take possession when Mr. Stanton obeys the order thus given.

Now, may not the President of the United States issue a letter of authority in contemplation that a vacancy is about to occur? Is he bound to take a technical view of this subject, and have the order creating the vacancy first sent and delivered, and then sit down at his table and sign the letter of authority afterwards? If he expects a vacancy, if he has done an act which, in his judgment, is sufficient to create a vacancy, may he not, in contemplation that that vacancy is to happen, sign the necessary paper to give the temporary authority to carry on the duties of the office?

Last of all, it is said he committed a high misdemeanor by intentionally violating the Constitution of the United States when he gave General Thomas this letter of authority. If I have been successful in

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the argument I have already addressed to you, you will be of opinion that, in point of fact, there was no violation of the Constitution of the United States by delivering this letter of authority, because the Constitution of the United States makes no provision on the subject of these temporary authorities, and the law of Congress has made provision equally applicable to the recess of the Senate and to its session.

Here, also, I beg leave to remind the Senate that, if Mr. Stanton's case does not fall within the tenure-of-office act, if the order which the President gave to him to vacate the office was a lawful order, and one which he was bound to obey, everything which is contained in this article, as well as in the preceding articles, fails. It is impossible, I submit, for the honorable managers to construct a case of an intention on the part of the President to violate the Constitution of the United States out of anything which he did in reference to the appointment of General Thomas, provided the order to Mr. Stanton was a lawful order, and Mr. Stanton was bound to obey it.

I advance, now, Senators, to a different class of articles, and they may, properly enough, I suppose, be called the "conspiracy articles," because they rest upon charges of conspiracy between the President and General Thomas. There are four of them,—the fourth, fifth, sixth, and seventh in number as they stand. The fourth and the sixth are framed under the act of July 31, 1861, which is found in 12 Statutes

at Large, page 284. The fifth and seventh are framed under no act of Congress. They allege an unlawful conspiracy, but they refer to no law by which the acts charged are made unlawful. The acts charged are called unlawful, but there is no law referred to and no case made by the articles within any law of the United States that is known to the President's counsel. I shall treat these articles, therefore, the fourth and sixth together, and the fifth and seventh together, because I think they belong in that order.

In the first place, let me consider the fourth and sixth, which charge a conspiracy within this act which I have just mentioned. It is necessary for me to read the substance of this law in order that you may see whether it can have any possible application to this case. It was passed on the 31st of July, 1861, as a war measure, and is entitled "An act to define and punish certain conspiracies." It provides:

That, if two or more persons within any State or Territory of the United States shall conspire together to overthrow or to put down or to destroy by force the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States, or by force or intimidation or threat to prevent any person from accepting or holding any office or trust or place of confidence under the United States.

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These are the descriptions of the offenses. The fourth and sixth articles contain allegations that the President and General Thomas conspired together, by force, intimidation, and threats, to prevent Mr. Stanton from continuing to hold the office of Secretary for the Department of War, and also that they conspired together by force to obtain possession of property belonging to the United States. These are the two articles which I suppose are designed to be drawn under this act, and these are the allegations which are intended to bring the articles within it. Now, it does seem to me that the attempt to wrest this law to any bearing whatsoever upon this prosecution is one of the extraordinary things which the case contains.

In the first place, so far from having been designed to apply to the President of the United States, or to any act he might do in the course of the execution of what he believed to be his duty, it does not apply to any man or any thing within the District of Columbia at all. "If two or more persons within any State or Territory of the United States." Not within the District of Columbia. This is a highly penal law, and an indictment found in the very words of this act charging things to have been done in the District of Columbia, and returned into the proper court of this District, I will undertake to say, would not bear a general demurrer because there is *locality* given to those things made penal by this act of Congress. It is made applicable to certain portions of the

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country, but not made applicable to the District of Columbia.

But not to dwell upon that technical view of the matter, and on which we should not choose to stand, let us see what is this case. The President of the United States is of opinion that Mr. Stanton holds the office of Secretary for the Department of War at his pleasure. He thinks so, first, because he believes the case of Mr. Stanton is not provided for in the tenure-of-office act, and no tenure of office is secured to him. He thinks so, secondly, because he believes that it would be judicially decided, if the question could be raised, that a law depriving the President of the power of removing such an officer at his pleasure is not a constitutional law. He is of opinion that in this case he cannot allow this officer to continue to act as his adviser and as his agent to execute the laws if he has lawful power to remove him, and under these circumstances he gives this order to General Thomas.

I do not view this letter of authority to General Thomas as a purely military order. The service which General Thomas was invoked for is a civil service; but, at the same time, Senators will perceive that the person who gave the order is the Commander in Chief of the army; that the person to whom it was given is the Adjutant General of the army; that the subject-matter to which the order relates is the performance of services essential to carry on the military service; and, therefore, when such an order was given by the Commander in Chief to the Ad-

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jutant General respecting a subject of this kind, is it too much to say that there was invoked that spirit of military obedience which constitutes the strength of the service? Not that it was a purely military order; not that General Thomas would have been subject to a court-martial for disobeying it; but that, as a faithful Adjutant General of the army of the United States, interested personally and professionally and patriotically to have the duties of the office of Secretary for the Department of War performed in a temporary vacancy, was it not his duty to accept the appointment unless he saw and knew that it was unlawful to accept it? I do not know how, in fact, he personally considered it—there has been no proof given on the subject—but I have always assumed—I think Senators will assume—that, when the distinguished general of the army of the United States, on a previous occasion, accepted a similar appointment, it was under views of propriety and duty such as those which I have now been speaking of; and how and why is there to be attributed to General Thomas, as a co-conspirator, the guilty intent of designing to overthrow the laws of his country, when a fair and just view of his conduct would leave him entirely without reproach?

And when you come, Senators, to the other co-conspirator, the President of the United States, is not the case still clearer? Make it a case of private right, if you please; put it as strongly as possible against the President in order to test the question.

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One of you has a claim to property. It may be a disputed claim. It is a claim which he believes may prove, when judicially examined, to be sound and good. He says to A. B.: "Go to C. D., who is in possession of that property. I give you this order to him to give it up to you, and, if he gives it up, take possession." Did anybody ever imagine that that was a conspiracy? Does not every lawyer know that, the moment you introduce into any transaction of this kind the element of a claim of right, all criminal elements are purged at once; and that this is always true between man and man where it is a simple assertion of private right, the parties to which are at liberty either to assert them or forego them, as they please.

But this was not such a case. This was a case of public right, of public duty; of public right claimed upon constitutional grounds, and upon the interpretation of the law which had been given to it by the law-makers themselves.

How can the President of the United States, under such circumstances, be looked upon by anybody, whether he may or may not be guilty of other things, as a co-conspirator under this act? These articles say that the conspiracy between the President and General Thomas was to employ force, threats, intimidation.

What they have proved against the President is that he issued these orders, and that alone. Now, on the face of these orders, there is no apology for the

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assertion that it was the design of the President that anybody, at any time, should use force, threats, or intimidation. The order is to Mr. Stanton to deliver up possession. The order to General Thomas is to receive possession from Mr. Stanton when he delivers it up.

No force is assigned to him; no authority is given to him to apply for or use any force, threats, or intimidation. There is not only no express authority, but there is no implication of any authority, to apply for or obtain or use anything but the order which was given him to hand to Mr. Stanton; and we shall offer proof, Senators, which we think cannot fail to be satisfactory in point of fact, that the President, from the first, had in view simply and solely to test this question by the law; that, if this was a conspiracy, it was a conspiracy to go to law, and that was the whole of it. We shall show you what advice the President received on this subject, what views in concert with his advisers he entertained, which, of course, it is not my province now to comment upon,—the evidence must first be adduced, then it will be time to consider it.

The other two conspiracy articles will require very little observation from me, because they contain no new allegations of fact which are not in the fourth and sixth articles, which I have already adverted to; and the only distinction between them and the others is that they are not founded upon this conspiracy act of 1861,—they simply allege an unlawful conspiracy,

and leave the matter there. They do not allege sufficient facts to bring the case within the act of 1861. In other words, they do not allege force, threats, or intimidation. I shall have occasion to remark upon these articles when I come to speak of the tenth article, because these articles, as you perceive, come within that category which the honorable manager announced here at an early period of the trial,—articles which require no law to support them; and when I come to speak of the tenth article, as I shall have occasion to discuss this subject, I wish that my remarks, so far as they may be deemed applicable, should be applied to these fifth and seventh articles which I have thus passed over.

I shall detain the Senate but a moment upon the ninth article, which is the one relating to the conversation with General Emory. The meaning of this article, as I read it, is that the President brought General Emory before himself as Commander in Chief of the army for the purpose of instructing him to disobey the law, with an intent to induce General Emory to disobey it, and with intent to enable himself unlawfully, and by the use of military force through General Emory, to prevent Mr. Stanton from continuing to hold office. Now, I submit that not only does this article fail of proof in its substance as thus detailed, but that it is disproved by the witness whom they have introduced to support it.

In the first place, it appears clearly from General

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Emory's statement that the President did not bring him there for any purpose connected with this appropriation bill affecting the command of the army, or the orders given to the army. This subject General Emory introduced himself, and, when the conversation was broken off, it was again recurred to by himself asking the President's permission to bring it to his attention. Whatsoever was said upon that subject was said not because the President of the United States had brought the commander of the department of Washington before him for that purpose, but because, having brought him there for another purpose, to which I shall allude in a moment, the commanding general chose himself to introduce that subject, and converse upon it, and obtain the President's views upon it.

In the next place, having his attention called to the act of Congress and to the order under it, the President expressed precisely the same opinion to General Emory that he had previously publicly expressed to Congress itself at the time when the act was sent to him for his signature, and there is found set out in his answer, on page 32 of the official report of these proceedings, what that opinion was; that he considered that this provision interfered with his constitutional right as Commander in Chief of the army; and that is what he said to General Emory. There is not even probable cause to believe that he said it for any other than the natural reason that General Emory had introduced the subject, had asked leave

to call his attention to it, and evidently expected and desired that the President should say something on the subject; and, if he said anything, was he not to tell the truth? That is exactly what he did say,—I mean the truth as he apprehended it.

It will appear in proof, as I am instructed, that the reason why the President sent for General Emory was not that he might endeavor to seduce that distinguished officer from his allegiance to the laws and the Constitution of his country, but because he wished to obtain information about military movements, which he was informed, upon authority which he had a right to and was bound to respect, might require his personal attention.

I pass, then, from this article, as being one upon which I ought not to detain the Senate, and I come to the last one, concerning which I shall have much to say, and that is the tenth article, which is all of and concerning the speeches of the President. In the front of this inquiry the question presents itself: What are impeachable offenses under the Constitution of the United States? Upon this question learned dissertations have been written and printed. One of them is annexed to the argument of the honorable manager who opened the cause for the prosecution. Another one on the other side of the question, written by one of the honorable managers themselves, may be found annexed to the proceedings in the House of Representatives upon the occasion of the first attempt to impeach the President.

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And there have been others written and published by learned jurists touching this subject.

I do not propose to vex the ear of the Senate with any of the precedents drawn from the middle ages. The framers of our Constitution were quite as familiar with them as the learned authors of these treatises; and the framers of our Constitution, as I conceive, have drawn from them the lesson which I desire the Senate to receive: that these precedents are not fit to govern their conduct on this trial.

In my apprehension, the teachings, the requirements, the prohibitions of the Constitution of the United States prove all that is necessary to be attended to for the purposes of this trial. I propose, therefore, instead of a search through the precedents which were made in the times of the Plantagenets, the Tudors, and the Stuarts, and which have been repeated since, to come nearer home, and see what provisions of the Constitution of the United States bear on this question, and whether they are not sufficient to settle it. If they are, it is quite immaterial what exists elsewhere.

My first position is that, when the Constitution speaks of "treason, bribery, and other high crimes and misdemeanors," it refers to, and includes only, high criminal offenses against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment.

“Treason” and “bribery.” Nobody will doubt that these are here designated high crimes and misdemeanors against the United States, made such by the laws of the United States, which the framers of the Constitution knew must be passed, in the nature of the Government they were about to create, because these are offenses which strike at the existence of that Government.

“Other high crimes and misdemeanors.” *Nosci-tur a sociis*. High crimes and misdemeanors; so high that they belong in this company with treason and bribery. That is plain on the face of the Constitution,—in the very first step it takes on the subject of impeachment. “High crimes and misdemeanors” against what law? There can be no crime, there can be no misdemeanor, without a law, written or unwritten, express or implied. There must be some law; otherwise there is no crime. My interpretation of it is that the language “high crimes and misdemeanors” means “offenses against the laws of the United States.”

Let us see if the Constitution has not said so. The first clause of the second section of the second article of the Constitution reads thus:

The President of the United States shall have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

“Offenses against the United States” would include “cases of impeachment,” and they might be

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pardoned by the President if they were not excepted. Then cases of impeachment are, according to the express declaration of the Constitution itself, cases of offenses against the United States. Still, the learned manager says that this is not a court, and that, whatever may be the character of this body, it is bound by no law. Very different was the understanding of the fathers of the Constitution on this subject.

[MR. BUTLER:] Will you state where it was I said it was bound by no law?

[MR. STANBERRY:] "A law unto itself."

[MR. BUTLER:] "No common or statute law" was my language.

[MR. CURTIS:] I desire to refer to the sixty-fourth number of the Federalist, which is found in Dawson's edition, on page 453:

The remaining powers which the plan of the convention allots to the Senate, in a distinct capacity, are comprised in their participation with the Executive in the appointment to offices, and in their judicial character as a court for the trial of impeachments. As in the business of appointments the Executive will be the principal agent, the provisions relating to it will most properly be discussed in the examination of that department. We will therefore conclude this head with a view of the judicial character of the Senate.

And then it is discussed. The next position to which I desire the attention of the Senate is that there is enough written in the Constitution to prove

that this is a court in which a judicial trial is now being carried on. "The Senate of the United States shall have the sole power to try all impeachments." "When the President is tried, the Chief Justice shall preside." "The trial of all crimes, except in case of impeachment, shall be by jury." This, then, is the trial of a crime. You are triors, presided over by the Chief Justice of the United States in this particular case, and that on the express words of the Constitution. There is also, according to its express words, to be an acquittal or a conviction on this trial for a crime. "No person shall be convicted without the concurrence of two-thirds of the members present." There is also to be a judgment in case there shall be a conviction:

Judgment in cases of impeachment shall not extend further than removal from office and disqualification to hold any office of honor, trust, or profit under the United States.

Here, then, there is the trial of a crime, a trial by a tribunal designated by the Constitution in place of court and jury; a conviction, if guilt is proved; a judgment on that conviction; a punishment inflicted by the judgment for a crime,—and this on the express terms of the Constitution itself. And yet, say the honorable managers, there is no court to try the crime, and no law by which the act is to be judged.

The honorable manager interrupted me to say that

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he qualified that expression of no law. His expression was: "No common or statute law." Well, when you get out of that field you are in a limbo, a vacuum, so far as law is concerned, to the best of my knowledge and belief.

I say, then, that it is impossible not to come to the conclusion that the Constitution of the United States has designated impeachable offenses as offenses against the United States; that it has provided for the trial of those offenses; that it has established a tribunal for the purpose of trying them; that it has directed the tribunal, in case of conviction, to pronounce a judgment upon the conviction, and inflict a punishment. All this being provided for, can it be maintained that this is not a court, or that it is bound by no law?

But the argument does not rest mainly, I think, upon the provisions of the Constitution concerning impeachment. It is, at any rate, vastly strengthened by the direct prohibition of the Constitution. "Congress shall pass no bill of attainder or *ex post facto* law." According to that prohibition of the Constitution, if every member of this body, sitting in its legislative capacity, and every member of the other body, sitting in its legislative capacity, should unite in passing a law to punish an act after the act was done, that law would be a mere nullity. Yet what is claimed by the honorable managers in behalf of members of this body?

As a Congress, you cannot create a law to punish

these acts if no law existed at the time they were done; but sitting here as judges, not only after the fact, but while the case is on trial, you may individually, each one of you, create a law by himself to govern the case. According to this assumption, the same Constitution which has made it a bill of rights of the American citizen, not only as against Congress, but as against the Legislature of every State in the Union, that no *ex post facto* law shall be passed,—this same Constitution has erected you into a body, and empowered every one of you to say, *Aut inveniam aut faciam*,—"If I cannot find a law I will make one."

Nay, it has clothed every one of you with imperial power; it has enabled you to say, *Sic volo, sic jubeo, stat pro ratione voluntas*,—"I am a law unto myself, by which law I shall govern this case." And, more than that, when each one of you, before he took his place here, called God to witness that he would administer impartial justice in this case according to the Constitution and the laws, he meant such laws as he might make as he went along. The Constitution, which had prohibited anybody from making such laws, he swore to observe; but he also swore to be governed by his own will,—his own individual will was the law which he thus swore to observe; and this special provision of the Constitution, that when the Senate sits in this capacity to try an impeachment the Senators shall be on oath, means merely that they shall swear to follow their own individual wills! I

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respectfully submit this view cannot consistently and properly be taken of the character of this body or of the duties and powers incumbent upon it.

Look for a moment, if you please, to the other provision. The same search into the English precedents, so far from having made our ancestors who framed and adopted the Constitution in love with them, led them to put into the Constitution a positive and absolute prohibition against any bill of attainder. What is a bill of attainder? It is a case before the Parliament where the Parliament make the law for the facts they find. Each legislator—for it is in their legislative capacity they act, not in a judicial one—is, to use the phrase of the honorable managers, “a law unto himself,” and, according to his discretion—his views of what is politic or proper under the circumstances—he frames a law to meet the case, and enacts it or votes in its enactment. According to the doctrine now advanced, bills of attainder are not prohibited by this Constitution; they are only slightly modified. It is only necessary for the⁵House of Representatives, by a majority, to vote an impeachment, and send up certain articles, and have two-thirds of this body vote in favor of conviction, and there is an attainder; and it is done by the same process, and depends on identically the same principles, as a bill of attainder in the English Parliament. The individual wills of the legislators, instead of the conscientious discharge of the duty of the judges, settle the result. I submit, then, Senators, that this view of

the honorable managers of the duties and powers of this body cannot be maintained.

But the attempt made by the honorable managers to obtain a conviction upon this tenth article is attended with some peculiarities which I think it is the duty of the counsel to the President to advert to. So far as regards the preceding articles, the first eight articles are framed upon allegations that the President broke a law. I suppose the honorable managers do not intend to carry their doctrine so far as to say that, unless you find the President did intentionally break a law, those articles are supported. As to those articles there is some law, unquestionably; the very gist of the charge being that he broke a law. You must find that the law existed; you must construe it and apply it to the case; you must find his criminal intent willfully to break the law,—before the articles can be supported.

But we now come to the tenth article, which depends upon no law at all, but, as I have said, is attended with some extraordinary peculiarities. The complaint is that the President made speeches against Congress. The true statement here would be much more restricted than that; for although in those speeches the President used the word "Congress," undoubtedly he did not mean the entire constitutional body organized under the Constitution of the United States,—he meant the dominant majority in Congress. Everybody so understood it; everybody must so understand it. But the complaint is that he

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made speeches against those who governed in Congress.

Well, who are the grand jury in this case? One of the parties spoken against. And who are the triors? The other party spoken against. One would think there was some incongruity in this; some reason for giving pause before taking any very great stride in that direction.

The honorable House of Representatives sends its managers here to take notice of what? That the House of Representatives has erected itself into a school of manners, selecting from its ranks those gentlemen whom it deems most competent, by precept and example, to teach decorum of speech; and they desire the judgment of this body whether the President has not been guilty of indecorum,—whether he has spoken properly, to use the phrase of the honorable manager. Now, there used to be an old-fashioned notion that, although there might be a difference of taste about oral speeches, and, no doubt, always have been and always will be many such differences, there was one very important test in reference to them, and that was whether they were true or false; but it seems that in this case that is no test at all. The honorable manager, in opening the case, finding, I suppose, that it was necessary, in some manner, to advert to that subject, has done it in terms which I will read to you:

The words are not alleged to be either false or defamatory, because it is not within the power of any man, how-

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ever high his official position, in effect to "slander" the Congress of the United States, in the ordinary sense of that word, so as to call on Congress to answer as to the truth of the accusation.

Considering the nature of our Government,—considering the experience which we have gone through on this subject,—that is a pretty lofty claim. Why, if the Senate please, if you go back to the time of the Plantagenets, and seek for precedents there, you will not find so lofty a claim as that. I beg leave to read from two statutes—the first being 3 Edward I. c. 34, and the second, 2 Richard II. c. 1—a short passage. The statute 3 Edward I. c. 34, after the preamble, enacts:

That from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people, or the great men of the realm; and he that doeth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale.

The statute 2 Richard II. Stat. 1, c. 5, enacted, with some alterations, the previous statute. It commenced thus:

Of devisors of false news and of horrible and false lies of prelates, dukes, earls, barons, and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm.

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The great men of the realm in the time of Richard II. were protected only against "horrible and false lies"; and when we arrive, in the course of our national experience during the war with France and the administration of Mr. Adams, to that attempt to check, not free speech, but free writing, Senators will find that, although it applied only to written libels, it contained an express section that the truth might be given in evidence. That was a law, as Senators know, making it penal, by written libels, to excite the hatred or contempt of the people against Congress, among other offenses; but the estimate of the elevation of Congress above the people was not so high but that it was thought proper to allow a defense of the truth to be given in evidence. I beg leave to read from this sedition act a part of one section, and make a reference to another, to support the correctness of what I have said. It is found in 1 Statutes at Large, page 596:

That if any person shall write, print, utter, or publish, or shall cause or procure to be written, printed, uttered, or published, or shall knowingly and willingly assist or aid in writing, printing, uttering, or publishing, any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, or the President of the United States, with intent to defame the said Government, or either House of the said Congress, or the said President, or to bring them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition

within the United States, or to excite any unlawful combinations therein,
and so forth.

Section 3 provides:

That if any person shall be prosecuted under this act for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon the trial of the cause, to give in evidence in his defense the truth of the matter contained in the publication charged as a libel. And the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases.

In contrast with the views expressed here, I desire now to read from the fourth volume of Mr. Madison's works, pages 542 and 547, passages which, in my judgment, are as masterly as anything Mr. Madison ever wrote upon the relations of the Congress of the United States to the people of the United States in contrast with the relations of the Government of Great Britain to the people of that island, and the necessity which the nature of our Government lays us under to preserve freedom of the press and freedom of speech:

The essential difference between the British Government and the American Constitution will place this subject in the clearest light. In the British Government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The Representatives of the people in the Legislature are only exempt themselves from distrust, but are considered as sufficient

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guardians of the rights of their constituents against the danger from the executive. Hence it is a principle that the Parliament is unlimited in its power, or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people—such as their Magna Charta, their Bill of Rights, etc.—are not reared against the Parliament, but against the royal prerogative. They are merely legislative precautions against executive usurpations. Under such a Government as this, an exemption of the press from previous restraint, by licensers appointed by the King, is all the freedom that can be secured to it. In the United States the case is altogether different. The people, not the Government, possess the absolute sovereignty. The Legislature, no less than the Executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by Constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licenses, but from the subsequent penalty of laws.

One other passage, on page 547, which has an extraordinary application to the subject now before you:

(1) The Constitution supposes that the President, the Congress, and each of its Houses may not discharge their

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trusts, either from defect of judgment or other causes. Hence they are all made responsible to their constituents at the returning periods of election; and the President, who is singly intrusted with very great powers, is, as a further guard, subjected to an intermediate impeachment.

(2) Should it happen, as the Constitution supposes it may happen, that either of these branches of the Government may not have duly discharged its trust, it is natural and proper that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people.

(3) Whether it has, in any case, happened that the proceedings of either or all of those branches evince such a violation of duty as to justify a contempt, a disrepute, or hatred among the people can only be determined by a free examination thereof, and a free communication among the people thereon.

(4) Whenever it may have actually happened that proceedings of this sort are chargeable on all or either of the branches of the Government, it is the duty, as well as right, of intelligent and faithful citizens to discuss and promulge them freely, as well to control them by the censorship of the public opinion as to promote a remedy according to the rules of the Constitution. And it cannot be avoided that those who are to apply the remedy must feel, in some degree, a contempt or hatred against the transgressing party.

These observations of Mr. Madison were made in respect to the freedom of the press. There were two views entertained at the time when the sedition law was passed concerning the power of Congress over

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this subject. The one view was that, when the Constitution spoke of freedom of the press, it referred to the common-law definition of that freedom. That was the view which Mr. Madison was controverting in one of the passages which I have read to you. The other view was that the common-law definition could not be deemed applicable, and that the freedom provided for by the Constitution, so far as the action of Congress was concerned, was an absolute freedom of the press. But no one ever imagined that freedom of speech, in contradistinction from written libel, could be restrained by a law of Congress; for whether you treat the prohibition in the Constitution as absolute in itself, or whether you refer to the common law for a definition of its limits and meaning, the result will be the same.

Under the common law, no man was ever punished criminally for spoken words. If he slandered his neighbor and injured him, he must make good in damages to his neighbor the injury he had done; but there was no such thing, at the common law, as an indictment for spoken words. So that this prohibition in the Constitution against any legislation by Congress in restraint of the freedom of speech is necessarily an absolute prohibition; and therefore this is a case not only where there is no law made prior to the act to punish the act, but a case where Congress is expressly prohibited from making any law to operate even on subsequent acts. What is the law to be? Suppose it is, as the honorable managers seem to

think it should be, the sense of propriety of each Senator appealed to. What is it to be? The only rule I have heard—the only rule which can be announced—is that you may require the speaker to speak properly. Who are to be the judges whether he speaks properly? In this case the Senate of the United States, on the presentation of the House of Representatives of the United States; and that is supposed to be the freedom of speech secured by this absolute prohibition of the Constitution.

That is the same freedom of speech, Senators, in consequence of which thousands of men went to the scaffold under the Tudors and the Stuarts. That is the same freedom of speech which caused thousands of heads of men and of women to roll from the guillotine in France. That is the same freedom of speech which has caused in our day, more than once, “order to reign in Warsaw.” The persons did not speak properly in the apprehension of the judges before whom they were brought. Is that the freedom of speech intended to be secured by our Constitution?

Mr. Chief Justice and Senators, I have to detain you but a very short time longer, and that is by a few observations concerning the eleventh article, and they will be very few, for the reason that the eleventh article, as I understand it, contains nothing new which needs any notice from me. It appears by the official copy of the articles which is before us—the printed copy—that this article was adopted at a later period than the preceding nine articles; and I suppose

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—it has that appearance—that the honorable managers, looking over the work they had already performed, perhaps not feeling perfectly satisfied to leave it in the shape in which it then stood, came to the conclusion to add this eleventh article, and they have compounded it out of the materials which they had previously worked up into the others.

In the first place, they said: Here are the speeches; we will have something about them. And, accordingly, they begin by the allegation that the President, at the executive mansion, on a certain occasion, made a speech, and without giving his words, but it is attributed to him that he had an intention to declare that this was not a Congress, within the meaning of the Constitution; all of which is denied in his answer, and there is no proof to support it. The President, by his whole course of conduct, has shown that he could have entertained no such intention as that. He has explained that fully in his answer, and I do not think it necessary to repeat the explanation.

Then they come to the old matter of the removal of Mr. Stanton. They say he made this speech denying the competency of Congress to legislate, and, following up its intent, he endeavored to remove Mr. Stanton. I have sufficiently discussed that, and I shall not weary the patience of the Senate by doing so any further.

Then they say that he made this speech, and followed up its intent by endeavoring to get possession of the money appropriated for the military ser-

vice of the United States. I have said all I desire to say upon that.

Then they say that he made it with the intent to obstruct what is called the law "for the better government of the rebel States," passed in March, 1867, and in support of that they have offered a telegram to him from Governor Parsons, and an answer to that telegram from the President, upon the subject of an amendment of the Constitution, sent in January before the March when the law came into existence; and, so far as I know, that is the only evidence which they have offered upon that subject. I leave, therefore, with these remarks, that article for the consideration of the Senate.

It must be unnecessary for me to say anything concerning the importance of this case, not only now, but in the future. It must be apparent to every one in any way connected with or concerned in this trial that this is and will be the most conspicuous instance which ever has been or can ever be expected to be found of American justice or American injustice,—of that justice which Mr. Burke says is the great standing policy of all civilized states, or of that injustice which is sure to be discovered, and which makes even the wise man mad, and which, in the fixed and immutable order of God's providence, is certain to return to plague its inventors.

After the introduction of the evidence and the presentation of the arguments, the vote was taken. The eleventh

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article was first voted upon, each member of the Senate voting "guilty," or "not guilty," as his name was called. The result was, thirty-five Senators voted for conviction, and seventeen for acquittal. This was a victory for the President as a two-thirds vote was required to condemn. Later the second and third articles were voted upon with precisely the same result. Upon the remaining articles no vote was taken.

The greatest trial of its kind in history was now over, and the Senate adjourned *sine die*.

Referring to the speech of Mr. Curtis, which was probably the greatest of his many forensic efforts, Benjamin F. Butler, one of the House managers, said, after the trial: "After Judge Curtis had presented the case of his client, nothing more was added in his behalf, although in the five or six closing speeches of his other counsel, much else was said."

One of the newspaper correspondents, in a communication to his paper, wrote as follows:

"It became evident to those who were not already familiar with his style of oratory that Mr. Curtis was not, in the highest sense, an orator. He spoke from voluminous notes, and frequently consulted and read from the books of reference beside him. The clearness of his statements, the accuracy of his logic, and the precision and steadiness with which he advanced from every premise he established to conclusions, needed, in fact, no fiery oratory to enhance the effect. If his tones did not often thrill the heart, they reached the brain. They were earnest, if not eloquent, and there was a certain fascination in their monotony. They bore a heavier burden of matter than the chaff blown from the lips of many windy elocutionists, and

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that is one reason why their equable, repressed accents were tolerable.

“Two or three times Mr. Curtis indulged a fervor which gave to his aspect an inspiring majesty and glow. Then his voice had the tremor of a waterfall. Then his form shook like a pine; but as a pine recovers itself after a gust, and stands erect and stately as before, so, in an instant after these noble outbursts, the speaker of today was seen composed and motionless, as if every hot impulse of his nature had been thrust back—beaten into its lair.

“It is generally regarded that the speech is an original and invincible effort.”



THOMAS E. WATSON

Tom Watson in His Own Defense

THE grand jury serving at the November term, 1912, of the United States District Court, in session at Augusta, Ga., preferred an indictment against Thomas E. Watson, editor and publisher of Watson's Jeffersonian Magazine, charging him with having violated Section 211 of the Penal Code of the United States, which declares "every obscene, lewd and lascivious book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character, and every article, instrument, substance, drug and medicine" of a certain nature, to be non-mailable.

The indictment alleged in substance that the defendant caused to be deposited in the mails of the United States for mailing and delivery to divers persons, "certain obscene, lewd, lascivious" publications contained in a series of articles published in Mr. Watson's magazine and entitled, "The Roman Catholic Hierarchy: The Deadliest Menace to our Liberties and our Civilization."

The indictment contained three counts.

The first count related to an alleged unlawful pub-

lication contained in the July, 1911, issue of the magazine beginning with the words, "In Cut No. 7 we have the 'sacred four' of Phallic worship," and concluding with the words, "the most profligate of pagan religions."

The second count charged to be unlawful a publication contained in the May, 1912, issue of the magazine beginning with the words, "A chapter for the consideration of legislators, husbands, and fathers. Some of the matters on which the Priest of Rome must question his penitents. Dens wants the confessors to interrogate on the following matters," and continuing with the Latin words, "*Peccant uxores, quæ susceptum viri,*" and other words in the same language, and concluding with the words, "*jam nequent jure conjugii uti.*"

The third count alleged the unlawfulness of a publication contained in the April, 1912, issue of the magazine beginning with the words, "In the Confessional these modern priests of Bacchus can and do learn," and concluding with the words, "are both destroyed morally by the confessional."

Not all of the words included in the portions of the magazine charged to be non-mailable were specifically quoted in the indictment, which alleged that each of the publications prosecuted for was "so obscene, lewd and lascivious as to be offensive to the court if set forth herein, and improper to be spread upon the

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records of the court, for which reasons the same is not set forth in full in this indictment."

The case came on for trial before Judge Rufus E. Foster, presiding, at Augusta, Ga., on October 21, 1913.

The right of the Government to prosecute for the publication of an *extract* from a written or printed article was denied by the defense, which took the position that unless the article *as a whole* was obscene, the character of the *extract* could not be inquired into.

The defense insisted further that a publication in a dead language was not criminal under the terms of the statute upon which the prosecution was based.

Moreover, that the statute itself, if applicable to a case of this character, was void and unconstitutional in that it was an attempt to abridge the freedom of the press.

Hon. S. G. McLendon, of counsel for the defense, made a masterful plea on the motion to quash the indictment.

When Mr. McLendon had concluded, Mr. Watson himself addressed the court; presenting his own views in an argument that was brief but compelling.

Mr. Watson was formerly a member of the American Congress, and at one time a candidate for the Presidency of the United States. He is a brilliant lawyer, a far-famed orator, and, as writer and historian, his reputation is international in its scope.

As he spoke, the lawyers and laymen of the crowded courtroom listened as one man.

Owing to the prominence and distinction of the defendant, the nature of the case and the several issues involved, the trial was of such magnitude and interest as to assume high place in the forensic literature of the times.

Mr. Watson's Address to the Court

IF THE COURT PLEASE: I submit that under this statute no extract from a book or pamphlet can be prosecuted.

The general character of the book or pamphlet must, on the face of it, and from the unavoidable construction which would be placed upon it by the average reader, be violative of the law.

Now, if the court please, take a view of this statute, from beginning to end, and see the scope of it. Where there are two lines dealing with an obscene book, there are ten lines dealing with vile drugs that are intended to destroy the fruit of a woman's womb; where there are two lines in the statute aiming at an improper book, a book which from its very character tends to inflame the basest of passions and leads toward the doing of those acts which bring into play the vile arts of the man who deals in drugs, to produce abortion, there are ten lines here to catch the

man or woman that tries to conceal the consequences to which the crime leads. That's the statute.

Ask any lawyer what Congress was aiming at when it framed that bill! It was aiming at race suicide! It was aiming at those men who prostitute the profession of medicine and prevent conception; those doctors who tell rakes how to escape the consequences of their immorality; who advise women how to escape the shame which, in a moment of weakness and passion and temptation, they have brought upon themselves, their mothers, their fathers, their families!

Ask any lawyer what Congress had in mind when it passed that Act, and the conclusion must be inevitable that Congress was aiming at those who, debauching women, bring into the world boys and girls that have no father who can say, "This is my son," or "This is my daughter!" Aiming against infanticide! That's the whole policy of the statute; if your honor will consider it fairly you will see that it does not say that you can seize a drug that is going through the mail, and by subtle analysis take out of that drug some arsenic, some strychnine—*some element which, by itself, would destroy*. No! You can do that with almost any compound that is prepared. Some of the very best compounds known to the pharmacists are the scientific mixtures of those elements which, when taken singly, would destroy life, after destroying health.

Congress did not mean to say that you can go, for instance, to old Doctor Sam Johnson's Dictionary,

which that rugged scholar worked on year after year in his attic, in Grub Street, London, and pick out the plain English of certain definitions there, and indict the man who sends the whole book through the mail. The book in its entirety is a monument of learning. You can go there and find filth, but as Doctor Sam Johnson himself replied to the lady who said to him at a social party, "Doctor Johnson, I object to your dictionary because it has so many filthy words in it," the stern old lexicographer frowned upon her, and growled, "*Madam, you have been looking for them!*"

Does the law mean to say: Go to Shakespeare and pick out those lines which are familiar to every reader, and indict a man for sending Shakespeares through the mail, because *those lines* are there?

Any such construction will not only cast out Shakespeare, but all of the English dramatists of olden times and many of those since.

The law does not mean to say: Go to Holy Writ, and lay your hand upon those plain English words of the old English translation, and indict one for sending them through the mail because they are obscene. They *are* obscene! I could read passage after passage, until your honor's face would mantle with the blush of modesty; but in sending the whole Bible through the mails no man violates the law, and Congress did not mean that.

Now, then, is the defendant at the bar indicted for publishing a book which *in its whole tendency and character* is obscene and demoralizing? There are

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writings—I could name many of them—your honor will voluntarily call them to mind—*where the whole book is meant to inflame the sensual passion!*

Does the learned District Attorney in his indictment say that this entire series of magazines, or any one single copy of the magazine, *is of that tendency and character?* This law requires him to do it.

The learned District Attorney says: “I can go to Watson’s Jeffersonian Magazine and I can pick out certain passages that are obscene”; and I can say to him here in the presence of this court and this country, he can go to the Word of God and do the very same thing.

Take a sermon, if your honor please. Suppose a sermon delivered by Spurgeon, or Wesley, or Cardinal Gibbons, on the Seventh Commandment, “*Thou shalt not commit adultery.*” I cannot conceive that the preacher would not go to the sayings of Solomon, and the songs of David, to Jeremiah and the prophets, and to the conditions in Sodom and Gomorrah. I cannot conceive of a preacher who would sweep with imperial mind that vast question of the passions which would destroy the man, *if not restrained*; would destroy the woman, *if not restrained*; would destroy the nation, *if not restrained*—I cannot conceive of a sermon preached upon that subject that would not have words in it which you could take out and say, *this extract* is obscene.

That’s enough to give the court my idea.

Now, the language of the law is plain. It does not

say every line or paragraph, or page, or chapter; it says *every book, pamphlet, picture, paper, letter, writing*—TAKE THE THING IN ITS ENTIRETY.

Judge the man by what he is, his entirety.

Judge not Cromwell by the wart on his face.

That's the law, that's common sense, and that's justice.

Here comes half a page where Congress goes after articles and things that are designed, adapted, and intended to prevent conception, or to destroy the fruit of the womb after conception, showing that the entire purpose of Congress was to do away with, penalize, drive out of business those vile creatures who have polluted themselves and prostituted whatever talent God gave them, to making books, pictures and devices for that vile purpose.

So I say the publication in its entirety should be alleged to be of that character, and the proof should follow up the allegations. In this case the learned District Attorney says on the face of the indictment, "I do not accuse the defendant of publishing an obscene book; I do not arraign this defendant for an obscene chapter, even; I do not say that he is engaged in a business such as aimed at by Congress, but I find on one page, or two pages, or three pages out of thousands of pages, extracts which I think objectionable; and I am indicting him, not for the publication, *but for the extracts.*"

If you honor please, if that be the law, the Code of the State of Georgia, sent through the mails, would

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convict the man who sent it, because there are statutes in the Code of Georgia that are necessarily obscene, *because they deal with things obscene.*

How can you define sodomy without being obscene? How can you define the crime of the white slaver without calling up the picture obscene, and defining the crime in language which, by itself, is obscene?

That's enough, on that.

Now, the second count, with submission:

Whenever our law speaks of publication, *it means in the language of the realm.* Whenever English law speaks of *finance* of any kind, pounds, shillings and pence are suggested; the German mention of finance brings up one word, the French mention, another; but when we allude to *money* in the United States, *it naturally suggests dollars and cents.* That's the language of our law.

Suppose a man indicted in France for publishing obscene literature. We would naturally infer, until the contrary appeared, that he published it in the French language. Why? Because the ordinary man who reads the newspaper, or the book, is not supposed to know anything but the language of his country. When the very same law that speaks of publications here, tells the marshal of this court how to advertise property for sale, what does it mean? Advertise it in English, the language of the country.

I need hardly remind your honor that you cannot

go to any library and take out any standard book of history, whether it be Gibbon or some other, that you won't find certain passages in which he says, "I think it best to leave this passage in the language of the original." *It is published to scholars*, to the few who can read some other language, *but not published within the purview of the law.*

The point I make is, that the learned District Attorney, in this case, arraigns the defendant because he put in his magazine *a certain quotation in a dead language*, to-wit, the Latin language. I respectfully submit that the learned District Attorney cannot produce to this court a single decision in which it has ever been held that *that* is a violation of the statute.

The District Attorney says that two or three pages in Watson's Magazine are in Latin, and we respectfully submit that *that is not published within the meaning of the law.*

As to the liberties of the press, and as to the power of Congress over the liberties of the press, your honor has indicated your opinion. I beg you, however, to bear in mind this: *it is an unsatisfactory course of reasoning to argue that a publisher is not denied the liberties of the press when he is shut out of the mails.*

Of course he can send his book by freight train; of course he can send his book by the express train; of course he can send his book by hand: but when the general Government takes to itself the monopoly (which used to be enjoyed by private parties) of fur-

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nishing the country its mail matter, then the Government joins itself with the publisher, and when the Government denies a man access to the mail, it has denied him the freedom of the press.

Now, without entering into the question as to whether Congress had the authority to abridge the freedom of the press, and whether the curtailing of the privilege to publishers would be an abridgment of the press, I simply wish to remind your honor of the enormous consequences of the judiciary being called upon to set precedents, which, in turn, become laws, for stifling freedom of expression.

John Marshall said one thing which my learned counsel did not read. I will read it by the permission of the court:

Perhaps it (abuse of free press) is an evil inseparable from the good with which it is allied. Perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable these measures might be which might correct without enslaving the press, they have never yet been devised in America.

And Mr. Justice Field said, in *ex parte Jackson*:

The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with the rights reserved to the people, of far greater importance than the transportation of the mail.

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If your honor please, in our complex and complicated system and society, if there is anything that is becoming apparent it is, that freedom of expression of old-time beliefs are becoming more and more restricted. If I had commenced—if the defendant had commenced in his magazine, *to denounce the Mormon Church*, the defendant could not have done that subject justice without coming in collision with the construction which the District Attorney seems to put upon this Act. If the construction which he puts upon the Act is good law, I submit to the court that this logically follows: *the worse an evil is, the greater the danger of exposing it*. The more obscene a practice becomes, the more careful the editor must be to avoid uncovering it.

If it be a crime to say about this thing what was said in that magazine, *what was the thing itself, if what was said is true?*

The defendant at the bar is not accused of slandering anybody; the defendant at the bar is not accused of having lied on anybody; the defendant at the bar is admitted to have told the truth, so far as this indictment is concerned, but it states that *the truth is obscene*.

I submit to the court, if the truth be obscene, whether it was not a duty in any man placed as an editor is placed, as one who thinks he may have some influence upon the thought and feeling of his time, whether it was not his duty to speak out and expose it, even though he were punished for it.

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At the conclusion of Mr. Watson's address, Hon. Alexander Akerman, the District Attorney, made an able reply in behalf of the Government.

The ruling of the court was then made, sustaining the motion of the defense and dismissing the case.

In rendering the opinion, Judge Foster said:

"It appears in this indictment, in all three counts, that the publication alleged to have been sent through the mails in violation of the law is an extract from a complete article. It is clearly my opinion that the Government is required to plead the entire article. The article is obscene as a whole, or is not obscene, and we cannot take out a few paragraphs here and there and charge them as obscene and make them the basis of an indictment. It may be that a paragraph here and there is sufficient to impress the whole publication with obscenity, but the defendant is entitled to be charged with sending the complete article.

"The publication is an entire thing. It is not a part or extract. We would be able to indict a sender of the Bible on this theory. We might take the episode of Potiphar's wife, or the relations of Onan to his brother's widow, or something of that sort, and indict just as well.

"I am not pretending to rule on any other feature of this indictment. The question of whether it is obscene if set out in a dead language is not passed upon. On this view, I will sustain the motion to quash.

"It is possible for the Government to re-indict and make these entire articles part of the indictment."

The Historic Case of Milligan *et al.*

LAMBDIN P. MILLIGAN and two others were charged with being members of a secret society known as the "Sons of Liberty" and "Order of American Knights," alleged to have been organized for the purpose of bringing about the destruction of the American Government; and on this charge they were arrested in Indiana, in October, 1864, by order of General A. P. Hovey, who was commander of the military district of that State.

The defendants were tried before a military commission, were adjudged to be guilty, and sentenced to be hanged.

They immediately brought *habeas corpus* proceedings before the Circuit Court of the United States, and asked for their discharge upon the ground that the military commission had no jurisdiction over them. They asserted that they were entitled to the right of trial by jury, that this had been denied them, and that they were being unlawfully held.

The Circuit Court was divided in opinion and certified the question to the Supreme Court of the United States.

The Historic Case of Milligan et al.

The Government was represented before the Supreme Court by Henry Stanberry, Benjamin F. Butler, and Attorney General James J. Speed; while James A. Garfield, Joseph E. McDonald, David Dudley Field, and Jeremiah S. Black appeared for the prisoners.

Mr. Butler, in outlining to the court the position of the Government, stated:

"We do not desire to exalt the martial above the civil law, or to substitute the necessarily despotic rule of the one for the mild and healthy restraints of the other. Far otherwise. We demand only that, when the law is silent; when justice is overthrown; when the life of the Nation is threatened by foreign foes that league and wait and watch without, to unite with domestic foes within, who had seized almost half the territory, and more than half the resources, of the Government, at the beginning; when the capital is imperiled; when the traitor within plots to bring into its peaceful communities the braver rebel who fights without; when the judge is deposed; when the juries are dispersed; when the sheriff, the executive officer of the law, is powerless; when the bayonet is called in as the final arbiter; when on its armed forces the Government must rely for all it has of power, authority and dignity; when the citizen has to look to the same source for everything he has of right in the present, or hope in the future—then we ask that martial law may so prevail, that the civil law may again live, to the end that

this may be a 'government of laws, and not of men.' ”

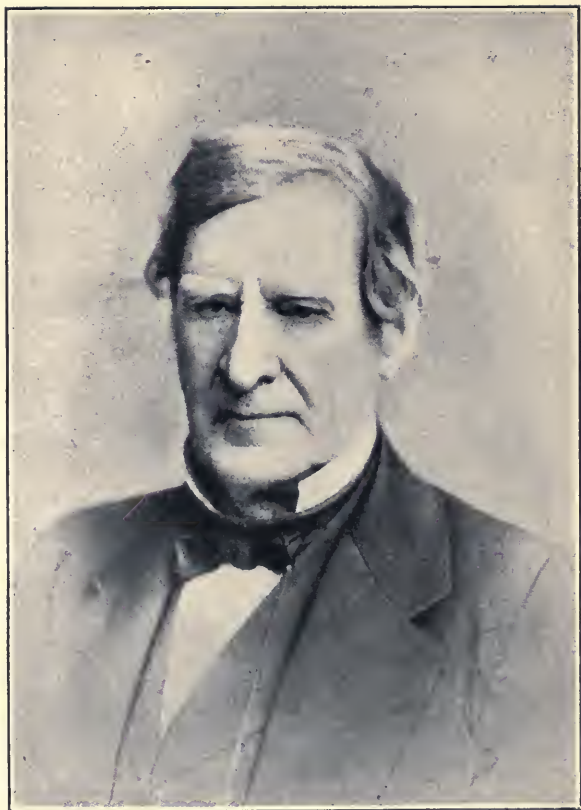
Jeremiah S. Black delivered the main argument for the prisoners at the bar.

Argument of Mr. Black

MAY IT PLEASE YOUR HONORS:

I am not afraid that you will underrate the importance of this case. It concerns the rights of the whole people. Such questions have generally been settled by arms. But since the beginning of the world no battle has ever been lost or won upon which the liberties of a nation were so distinctly staked as they are on the result of this argument. The pen that writes the judgment of the court will be mightier for good or for evil than any sword that ever was wielded by mortal arm.

As might be expected from the nature of the subject, it has been a good deal discussed elsewhere, in legislative bodies, in public assemblies, and in the newspaper press of the country. But there it has been mingled with interests and feelings not very friendly to a correct conclusion. Here we are in a higher atmosphere, where no passion can disturb the judgment or shake the even balance in which the scales of reason are held. Here it is purely a judicial question; and I can speak for my colleagues as well as myself when I say that we have no thought to suggest which we do not suppose to be a fair element in the strictly legal judgment which you are required to make up.



JEREMIAH S. BLACK

Argument of Mr. Black

In performing the duty assigned to me in the case, I shall necessarily refer to the mere rudiments of constitutional law, to the most commonplace topics of history, and to those plain rules of justice and right which pervade all our institutions. I beg your honors to believe that this is not done because I think that the court, or any member of it, is less familiar with these things than I am, or less sensible of their value; but simply and only because, according to my view of the subject, there is absolutely no other way of dealing with it. If the fundamental principles of American liberty are attacked, and we are driven behind the inner walls of the Constitution to defend them, we can repel the assault only with those same old weapons which our ancestors used a hundred years ago. You must not think the worse of our armor because it happens to be old-fashioned and looks a little rusty from long disuse.

The case before you presents but a single point, and that an exceedingly plain one. It is not encumbered with any of those vexed questions that might be expected to arise out of a great war. You are not called upon to decide what kind of a rule a military commander may impose upon the inhabitants of a hostile country which he occupies as a conqueror, or what punishment he may inflict upon the soldiers of his own army or the followers of his camp; or yet how he may deal with civilians in a beleaguered city or other place in a state of actual siege, which he is required to defend against a public enemy. This contest covers no such

ground as that. The men whose acts we complain of erected themselves into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the Army or Navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both State and National, were in full exercise of their functions.

My clients were dragged before this strange tribunal, and after a proceeding, which it would be mere mockery to call a trial, they were ordered to be hung. The charge against them was put into writing and is found in this record, but you will not be able to decipher its meaning. The relators were not accused of treason; for no act is imputed to them which, if true, would come within the definition of that crime. It was not conspiracy under the Act of 1861, for all concerned in this business must have known that conspiracy was not a capital offense. If the commissioners were able to read English they could not help but see that it was made punishable, even by fine and imprisonment, only upon condition that the parties should first be convicted before a circuit or district court of the United States. The Judge Advocate must have meant to charge them with some offense unknown to the laws, which he chose to make capital by legislation of his own, and the commissioners were so profoundly igno-

Argument of Mr. Black

rant as to think that the legal innocence of the parties made no difference in the case. I do not say, what Sir James Mackintosh said of a similar proceeding, that the trial was a mere conspiracy to commit willful murder upon three innocent men. The commissioners are not on trial; they are absent and undefended; and they are entitled to the benefit of that charity which presumes them to be wholly unacquainted with the first principles of natural justice, and quite unable to comprehend either the law or the facts of a criminal cause.

Keeping the character of the charges in mind, let us come at once to the simple question upon which the court below divided in opinion: Had the commissioners jurisdiction—were they invested with legal authority to try the relators and put them to death for the offense of which they were accused? We answer “No; and therefore the whole proceeding, from beginning to end, was utterly null and void. On the other hand, it is absolutely necessary for those who oppose us to assert, and they do assert, that the commissioners had complete legal jurisdiction, both of the subject-matter and of the parties, so that their judgment upon the law and the facts is absolutely conclusive and binding, not subject to correction, nor open to inquiry in any court whatever. Of these two opposite views you must adopt one or the other, for there is no middle ground on which you can possibly stand.

I need not say (for it is the law of the hornbooks) that where a court, whatever may be its power in

other respects, presumes to try a man for an offense of which it has no right to take judicial cognizance, all its proceedings in that case are null and void. If the party is acquitted he can not plead the acquittal afterwards in bar of another prosecution; if he is found guilty and sentenced he is entitled to be relieved from the punishment. If a circuit court of the United States should undertake to try a party for an offense clearly within the exclusive jurisdiction of the State courts the judgment could have no effect. If a county court in the interior of a State should arrest an officer of the Federal Navy, try him, and order him to be hung for some offense against the law of nations, committed upon the high seas or in a foreign port, nobody would treat such a judgment otherwise than with mere derision. The Federal courts have jurisdiction to try offenses against the laws of the United States, and the authority of the State courts is confined to the punishment of acts which are made penal by State laws. It follows that where the accusation does not amount to an offense against the law of either the State or Federal Government, no court can have jurisdiction to try it. Suppose, for example, that the judges of this court should organize themselves into a tribunal to try a man for witchcraft, or heresy, or treason against the Confederate States of America, would anybody say that your judgment had the least validity?

I care not, therefore, whether the relators were intended to be charged with treason or conspiracy or with some offense of which the law takes no notice.

Argument of Mr. Black

Either or any way, the men who undertook to try them had no jurisdiction of the subject-matter.

Nor had they jurisdiction of the parties. It is not pretended that this was a case of impeachment, or a case arising in the land or naval forces. It is either nothing at all or else it is a simple crime against the United States, committed by private individuals not in the public service, civil or military. Persons standing in that relation to the Government are answerable for the offenses which they may commit only to the civil courts of the country. So says the Constitution, as we read it, and the Act of Congress of March 3, 1863, which was passed with express reference to persons precisely in the situation of these men, declares that they shall be delivered up for trial to the proper civil authorities.

There being no jurisdiction of the subject-matter or of the parties, you are bound to relieve the petitioners. It is as much the duty of a judge to protect the innocent as it is to punish the guilty. Suppose that the secretary of some department should take it into his head to establish an ecclesiastical tribunal here in the city of Washington, composed of clergymen "organized to convict" everybody who prays after a fashion inconsistent with the supposed safety of the State. If he would select the members with a proper regard to the *odium theologicum*, I think I could insure him a commission that would hang every man and woman who might be brought before it.

But would you, the judges of the land, stand by and

see their sentences executed? No; you would interpose your writ of prohibition, your habeas corpus, or any other process that might be at your command, between them and their victims. And you would do that for precisely the reason which requires your intervention here: Because religious errors, like political errors, are not crimes which anybody in this country has jurisdiction to punish, and because ecclesiastical commissions, like military commissions, are not among the judicial institutions of this people. Our fathers long ago cast them both aside among the rubbish of the Dark Ages; and they intended that we, their children, should know them only that we might blush and shudder at the shameless injustice and the brutal cruelties which they were allowed to perpetrate in other times and other countries.

But our friends on the other side are not at all impressed with these views. Their brief corresponds exactly with the doctrines propounded by the Attorney General, in a very elaborate official paper which he published last July, upon this same subject. He then avowed it to be his settled and deliberate opinion that the military might "take and kill, try and execute"—I use his own words—persons who had no sort of connection with the Army or Navy. And, though this be done in the face of the open courts, the judicial authority, according to him, are utterly powerless to prevent the slaughter which may thus be carried on. That is the thesis which the Attorney General and his assistant counselors are to maintain this day, if they

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can maintain it, with all the power of their artful eloquence.

We on the other hand, submit that a person not in the military or naval service can not be punished at all until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offense. There is our proposition. Between the ground we take and the ground they occupy there is and there can be no compromise. It is one way or the other.

Our proposition ought to be received as true without any argument to support it, because if that, or something precisely equivalent to it, be not a part of our law, this is not, what we have always supposed it to be, a free country. Nevertheless, I take upon myself the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very framework of the Government, so that it is utterly impossible to detach it without destroying the whole political structure under which we live. By removing it you destroy the life of this Nation as completely as you would destroy the life of an individual by cutting the heart out of his body. I proceed to the proof.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the Government is the exercise of judicial authority. That is a kind of authority which would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else

were a judge as well as he. Therefore in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and well; and their authority is exclusive; they can not share it with others to whom it has not been committed.

Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words, by declaring that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Congress has, from time to time, ordained and established certain inferior courts; and in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so called, which the United States can lawfully exercise. That was the compact made with the General Government at the time it was created. The States and the people agreed to bestow upon that Government a certain portion of the judicial power, which otherwise would have remained in their own hands, but gave it on a solemn trust, and coupled the grant of it with this express condition that it should never be used in any way but one; that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way not only violates the law of the land, but he treacherously

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tramples upon the most important part of that sacred covenant which holds these States together.

May it please your honors, you know, and I know, and everybody else knows, that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the Government, whose sole and exclusive business it should be to distribute justice among the people according to the wants of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause, surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest, and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent, because their salaries could not be reduced; and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob and beyond the reach of Executive influence, it was not intended that they should be wholly irresponsible. For any willful or corrupt violation of their duty they are liable to be impeached; and they can not escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory

reasons for the judgments they pronounce. In ordinary, tranquil times the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that tranquillity was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed that in such times judges themselves might not be safely trusted in criminal cases, especially in prosecutions for political offenses, where the whole power of the Executive is arrayed against the accused party.

All history proves that public officers of any Government, when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit toward actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of hireling spies and common delators, who make merchandise of their oaths and trade in the blood of their fellow men.

During the civil commotions in England, which lasted from the beginning of the reign of Charles I to the revolution of 1688, the best men and the purest patriots that ever lived fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men the

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latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose.

Let me say here that nothing has occurred in the history of this country to justify the doubt of judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench is embodied in this simple fact, that if the executive officers of this Government have ever desired to take away the life or the liberty of a citizen contrary to law they have not come into the courts to get it done; they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals, composed of men whose gross ignorance and supple subservience could always be relied on for those base uses to which no judge would ever lend himself.

But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the brutal ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the base venality of such men as Saunders and Wright. It seemed necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against the wrath and malice of his Government. To that end they could think of no better provision than a public trial before an impartial jury.

I do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. I only say that it is the best

protection for innocence and the surest mode of punishing guilt that has yet been discovered. It has borne the test of a longer experience, and borne it better, than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur, and her prosperity to that than to all other causes put together. It has had the approbation not only of those who lived under it, but of great thinkers who looked at it calmly from a distance and judged it impartially; Montesquieu and De Tocqueville speak of it with an admiration as rapturous as Coke and Blackstone. Within the present century the most enlightened States of Continental Europe have transplanted it into their countries, and no people ever adopted it once and were afterwards willing to part with it. It was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year the revolution of the Barricades gave the right of trial by jury to every Frenchman.

Those colonists of this country who came from the British Islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places, where trial by jury did not exist, became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired.

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An attempt was made to set it aside and substitute military trials in its place, by Lord Dunmore, in Virginia, and Gen. Gage, in Massachusetts, accompanied with the excuse, which has been repeated so often in late days, namely, that rebellion had made it necessary; but it excited intense popular anger, and every colony, from New Hampshire to Georgia, made common cause with the two whose rights had been especially invaded. Subsequently the Continental Congress thundered it into the ear of the world as an unendurable outrage, sufficient to justify universal insurrection against the authority of the Government which had allowed it to be done.

If the men who fought out our revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have covered themselves all over with infamy as with a garment, for they would have proved themselves basely recreant to the principles of that very liberty of which they professed to be the special champions. But they were guilty of no such treachery. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed in the *Federalist* the universal sentiment of his time when he said that the arbitrary power of conviction and punishment for pretended offenses had been the great

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engine of despotism in all ages and all countries. The existence of such a power is utterly incompatible with freedom. The difference between a master and his slave consists only in this, that the master holds the lash in his hands and he may use it without legal restraint, while the naked back of the slave is bound to take whatever is laid on it.

But our fathers were not absurd enough to put unlimited power in the hands of the ruler and take away the protection of law from the rights of individuals. It was not thus that they meant "to secure the blessings of liberty to themselves and their posterity." They determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground, but the fruits of every popular victory should be garnered up in this new Government. Of all the great rights already won they threw not an atom away. They went over Magna Charta, the Petition of Rights, the Bill of Rights, and the rules of the common law, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. They put all those provisions into the organic law, so that neither tyranny in the Executive nor party rage in the Legislature could change them without destroying the Government itself.

Look for a moment at the particulars and see how

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carefully everything connected with the administration of punitive justice is guarded:

1. No *ex post facto* law shall be passed. No man shall be answerable criminally for any act which was not defined and made punishable as a crime by some law in force at the time when the act was done.

2. For an act which is criminal he can not be arrested without a judicial warrant founded on proof of probable cause. He shall not be kidnapped and shut up on the mere report of some base spy, who gathers the materials of a false accusation by crawling into his house and listening at the keyhole of his chamber door.

3. He shall not be compelled to testify against himself. He may be examined before he is committed and tell his own story if he pleases, but the rack shall be put out of sight, and even his conscience shall not be tortured, nor shall his unpublished papers be used against him, as was done most wrongfully in the case of Algernon Sidney.

4. He shall be entitled to a speedy trial; not kept in prison for an indefinite time without the opportunity of vindicating his innocence.

5. He shall be informed of the accusation, its nature, and grounds. The public accuser must put the charge into the form of a legal indictment, so that the party can meet it full in the face.

6. Even to the indictment he need not answer unless a grand jury, after hearing the evidence, shall say upon their oaths that they believe it to be true.

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7. Then comes the trial, and it must be before a regular court, of competent jurisdiction, ordained and established for the State and district in which the crime was committed; and this shall not be evaded by a legislative change in the district after the crime is alleged to be done.

8. His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the court. When they are called into the box he can purge the panel of all dishonesty, prejudice, personal enmity, and ignorance by a certain number of peremptory challenges, and as many more challenges as he can sustain by showing reasonable cause.

9. The trial shall be public and open, that no underhand advantage may be taken. The party shall be confronted with the witnesses against him, have compulsory process for his own witnesses, and be entitled to the assistance of counsel in his defense.

10. After the evidence is heard and discussed, unless the jury shall, upon their oaths, unanimously agree to surrender him up into the hands of the court as a guilty man, not a hair of his head can be touched by way of punishment.

11. After a verdict of guilty he is still protected. No cruel or unusual punishment shall be inflicted nor any punishment at all, except what is annexed by the law

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to his offense. It can not be doubted for a moment that if a person convicted of an offense not capital were to be hung on the order of a judge, such judge would be guilty of murder as plainly as if he should come down from the bench, tuck up the sleeves of his gown, and let out the prisoner's blood with his own hand.

12. After all is over the law continues to spread its guardianship around him. Whether he is acquitted or condemned, he shall never again be molested for that offense. No man shall be twice put in jeopardy of life or limb for the same cause.

These rules apply to all criminal prosecutions. But, in addition to these, certain special regulations were required for treason—the one great political charge under which more innocent men have fallen than any other. A tyrannical government calls everybody a traitor who shows the least unwillingness to be a slave. The party in power never fails, when it can, to stretch the law on that subject by construction, so as to cover its honest and conscientious opponents. In the absence of a constitutional provision it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of the basest minions that skulk about under the pay of the Executive. Therefore a definition of treason was given in the fundamental law, and the legislative authority could not enlarge it to serve the purpose of partisan malice. The nature and amount of evidence required to prove the crime was also prescribed, so

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that prejudice and enmity might have no share in the conviction. And lastly, the punishment was so limited that the property of the party could not be confiscated and used to reward the agents of his persecutors or strip his family of their subsistence.

If these provisions exist in full force, unchangeable and irrepealable, then we are not hereditary bondsmen. Every citizen may safely pursue his lawful calling in the open day, and at night, if he is conscious of innocence, he may lie down in security and sleep the sound sleep of a freeman.

I say they are in force, and they will remain in force. We have not surrendered them, and we never will. If the worst comes to the worst we will look to the living God for His help, and defend our rights and the rights of our children to the last extremity. Those men who think we can be subjected and abjected to the condition of mere slaves are wholly mistaken. The great race to which we belong has not degenerated so fatally.

But how am I to prove the existence of these rights? I do not propose to do it by a long chain of legal argumentation, nor by the production of numerous books with the leaves dog-eared and the pages marked. If it depended upon judicial precedents, I think I could produce as many as might be necessary. If I claimed this freedom, under any kind of prescription, I could prove a good long procession in ourselves and those under whom we claim it.

I might begin with Tacitus and show how the con-

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test arose in the forests of Germany more than 2,000 years ago; how the rough virtues and sound common sense of that people established the right of trial by jury, and thus started on a career which has made their posterity the foremost race that ever lived in all the tide of time. The Saxons carried it to England, and were ever ready to defend it with their blood. It was crushed out by the Danish invasion, and all that they suffered of tyranny and oppression during the period of their subjugation resulted from the want of trial by jury. If that had been conceded to them the reaction would not have taken place which drove back the Danes to their frozen homes in the North.

But those ruffian sea kings could not understand that, and the reaction came. Alfred, the greatest of revolutionary heroes and the wisest monarch that ever sat on a throne, made the first use of his power, after the Saxons restored it, to re-establish their ancient laws. He had promised them that he would and he was true to them, because they had been true to him. But it was not easily done; the courts were opposed to it, for it limited their power—a kind of power that everybody covets—the power to punish without regard to law. He was obliged to hang 44 judges in one year for refusing to give his subjects a trial by jury. When the historian says that he hung them, it is not meant that he put them to death without a trial. He had them impeached before the grand council of the nation, the Wittenagemote, the parliament of that time.

During the subsequent period of Saxon domination no man on English soil was powerful enough to refuse a legal trial to the meanest peasant. If any minister or any king, in war or in peace, had dared to punish a freeman by a tribunal of his own appointment he would have roused the wrath of the whole population; all orders of society would have resisted it; lord and vassal, knight and squire, priest and penitent, bocman and socman, master and thrall, copyholder and villein, would have risen in one mass and burned the offender to death in his castle, or followed him in his flight and torn him to atoms. It was again trampled down by the Norman conquerors, but the evils resulting from the want of it united all classes in the effort which compelled King John to restore it by the Great Charter.

Everybody is familiar with the struggles which the English people during many generations made for their rights with the Plantagenets, the Tudors, and the Stuarts, and which ended finally in the revolution of 1688, when the liberties of England were placed upon an impregnable basis by the Bill of Rights.

Many times the attempt was made to stretch the royal authority far enough to justify military trials, but it never had more than temporary success. Five hundred years ago Edward II closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in Parliament assembled, acknowledged with

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shame and sorrow that the execution of Lancaster was a mere murder, because the courts were open and he might have had a legal trial.

Queen Elizabeth, for sundry reasons affecting the safety of the State, ordered that certain offenders not of her army should be tried according to the law martial. But she heard the storm of popular vengeance rising, and, haughty, imperious, self-willed as she was, she yielded the point, for she knew that upon that subject the English people would never consent to be trifled with.

Strafford, as lord lieutenant of Ireland, tried the Viscount Stormont before a military commission. When impeached for it he pleaded in vain that Ireland was in a state of insurrection, that Stormont was a traitor, and the army would be undone if it could not defend itself without appealing to the civil courts. The Parliament was deaf; the King himself could not save him; he was condemned to suffer death as a traitor and a murderer.

Charles I issued commissions to divers officers for the trial of his enemies according to the course of military law. If rebellion ever was an excuse for such an act he could surely have pleaded it, for there was scarcely a spot in his kingdom, from sea to sea, where the royal authority was not disputed by somebody. Yet the Parliament demanded in their petition of right, and the King was obliged to concede, that all his commissions were illegal.

James II claimed the right to suspend the operation

of the penal laws, a power which the courts denied, but the experience of his predecessors taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offense he saw fit to charge them with if he could have selected their judges from among the mercenary creatures to whom he had given commands in his army. But this he dared not do. He was obliged to send the bishops to a jury and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe which a few months afterwards made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations on the other side of the Channel to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty of rebellion by the very act for which he arrested them. He had raised an army to meet the rebellion, and he was on Hounslow Heath, reviewing the troops organized for that purpose, when he heard the great shout of joy that went up from Westminster Hall, was echoed back from Templar Bar, spread down the city and over the Thames, and rose from every vessel on the river—the simultaneous shout of 200,000 men for the triumph of justice and law.

If it were worth the time I might detain you by showing how this subject was treated by the French Court of Cassation, in Geoffroy's case, under the Constitution of 1830, when a military judgment was un-

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hesitatingly pronounced to be void, though ordered by the King, after a proclamation declaring Paris in a state of siege. *Fas est ab hoste doceri*; we may lawfully learn something from our enemies—at all events, we should blush at the thought of not being equal on such a subject to the courts of Virginia, Georgia, Mississippi, and Texas, whose decisions my colleague, Gen. Garfield, has read and commented on.

The truth is that no authority exists anywhere in the world for the doctrine of the Attorney General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer from Coke to Wharton is against him. All military authors who profess to know the duties of their profession admit themselves to be under, not above, the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open.

When I say no book I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to disgrace the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. It is true, also, that court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders among such servile creatures. Those butchers' dogs,

that feed upon garbage and fatten upon the offal of the shambles, are always ready to bark at whatever interferes with the trade of their master.

But this case does not depend on authority. It is rather a question of fact than of law.

I prove my right to a trial by jury, just as I would prove my title to an estate if I held in my hand a solemn deed conveying it to me, coupled with undeniable evidence of long and undisturbed possession under and according to the deed. There is the charter by which we claim to hold it. It is called the Constitution of the United States. It is signed by the sacred name of George Washington and by 39 other names, only less illustrious than his. They represented every independent State then upon this continent, and each State afterwards ratified their work by a separate convention of its own people. Every State that subsequently came in acknowledged that this was the great standard by which their rights were to be measured. Every man that has ever held office in this country, from that time to this, has taken an oath that he would support and sustain it through good report and through evil. The Attorney General himself became a party to the instrument when he laid his hand upon the Gospel of God and solemnly swore that he would give to me and every other citizen the full benefit of all it contains.

What does it contain? This, among other things:

The trial of all crimes except in cases of impeachment shall be by jury.

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Again:

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

This is not all; another article declares that:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for the witnesses in his favor; and to have the assistance of counsel for his defense.

Is there any ambiguity there? If that does not signify that a jury trial shall be the exclusive and only means of ascertaining guilt in criminal cases, then I demand to know what words or what collocation of words in the English language would have that effect. Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the

Attorney General, or the Judge Advocate, or the head of a department? Shall this inestimable privilege be extended only to men whom the administration does not care to convict? Is it confined to vulgar criminals, who commit ordinary crimes against society, and shall it be denied to men who are accused of such offenses as those for which Sidney and Russell were beheaded, and Alice Lisle was hung, and Elizabeth Gaunt was burned alive, and John Bunyan was imprisoned 14 years, and Baxter was whipped at the cart's tail, and Prynne had his ears cut off? No; the words of the Constitution are all-embracing—

As broad and general as the casing air.

The trial of all crimes shall be by jury. All persons accused shall enjoy that privilege—and no person shall be held to answer in any other way.

That would be sufficient without more. But there is another consideration which gives it tenfold power. It is a universal rule of construction, that general words in any instrument, though they may be weakened by enumeration, are always strengthened by exceptions. Here is no attempt to enumerate the particular cases in which men charged with criminal offenses shall be entitled to a jury trial. It is simply declared that all shall have it. But that is coupled with a statement of two specific exceptions—cases of impeachment and cases arising in the land or naval forces. These exceptions strengthen the application of the general rule to all other cases. Where the law-

giver himself has declared when and in what circumstances you may depart from the general rule, you shall not presume to leave that onward path for other reasons and make different exceptions. To exceptions the maxim is always applicable, that "*expressio unius exclusio est alterius.*"

But we are answered that the judgment under consideration was pronounced in time of war, and it is therefore, at least morally, excusable. There may or there may not be something in that. I admit that the merits or demerits of any particular act, whether it involve a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion, and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers they will take all these things into consideration. But that presents the political aspect of the case, with which, I trust, we have nothing to do here. I decline to discuss it. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. If the sanitary regulations which defend the health of a city are ever to be relaxed it ought certainly not to be done when pestilence is abroad. When the Mississippi shrinks within its natural channel and creeps lazily along the bottom the inhabitants of the adjoining shore have no need of a dike to save them from inundation. But when the booming flood comes down from above and swells into a volume which rises high

above the plain on either side, then a crevasse in the levee becomes a most serious thing.

So in peaceable and quiet times our legal rights are in little danger of being overborne; but when the wave of arbitrary power lashes itself into violence and rage and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction. But this is a question which properly belongs to the jurisdiction of the stump and the newspaper.

There is another quasi-political argument—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means.

There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals. See how it applies to this case. Here were three men whom it was desirable to remove out of this world, but there was no proof on which any court would take their lives; therefore it was necessary, and being necessary it was right and proper, to create an illegal tribunal which would put them to death

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without proof. By the same mode of reasoning you can prove it equally right to poison them in their food, or stab them in their sleep.

Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering as this pretense of State necessity. A great authority calls it "the tyrant's devilish plea," and the common honesty of all mankind has branded it with everlasting infamy.

Of course, it is mere absurdity to say that these relators were necessarily deprived of their right to a fair and legal trial, for the record shows that a court of competent jurisdiction was sitting at the very time and in the same town, where justice would have been done without sale, denial, or delay. But concede, for the argument's sake, that a trial by jury was wholly impossible; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did; would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court? The question answers itself.

This trial was a violation of law, and no necessity could be more than a mere excuse for those who committed it. If the commissioners were on trial for murder or conspiracy to murder they might plead necessity if the fact were true, just as they would plead insanity or anything else to show that their guilt was not willful. But we are now considering the legal effect of

their decision, and that depends on their legal authority to make it. They had no such authority; they usurped a jurisdiction which the law not only did not give them but expressly forbade them to exercise, and it follows that their act is void, whatever may have been the real or supposed excuse for it.

If these commissioners, instead of aiming at the life and liberty of the relators, had attempted to deprive them of their property by a sentence of confiscation, would any court in Christendom declare that such a sentence divested the title? Or would a person claiming under the sentence make his right any better by showing that the illegal assumption of jurisdiction was accompanied by some excuse which might save the commissioners from a criminal prosecution?

Let me illustrate still further. Suppose you, the judges of this court, to be surrounded in the hall where you are sitting by a body of armed insurgents and compelled by main force to pronounce sentence of death upon the President of the United States for some act of his upon which you have no legal authority to adjudicate. There would be a valid sentence if necessity alone could create jurisdiction. But could the President be legally executed under it? No; the compulsion under which you acted would be a good defense for you against an impeachment or an indictment for murder, but it would add nothing to the validity of a judgment which the law forbade you to give.

That a necessity for violating the law is nothing

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more than a mere excuse to the perpetrator and does not in any legal sense change the quality of the act itself in its operation upon other parties is a proposition too plain on original principles to need the aid of authority. I do not see how any man of common sense is to stand up and dispute it. But there is decisive authority upon the point. In 1815, at New Orleans, Gen. Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city corporation, and members of the State Legislature insisted on it as the only way to save the "booty and beauty" of the place from the unspeakable outrages committed at Badajos and St. Sebastian by the very same troops then marching to the attack. Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement and another was sent four miles up the river. But, after he had saved the city and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal by the same judge who had declared it to be necessary, and he paid the penalty without a murmur. The Supreme Court of Louisiana, in "*Johnson versus Duncan*," decided that everything done during the siege in pursuance of martial rule but in conflict with the law of the land was void and of no effect, without

reference to the circumstances which made it necessary. Long afterwards the fine imposed upon Jackson was refunded, because his friends, while they admitted him to have violated the law, insisted that the necessity which drove him to it ought to have saved him from punishment due only to a willful offender.

The learned counsel on the other side will not assert that there was war at Indianapolis in 1864, for they have read "Coke's Institute," and Judge Grier's opinion in the Prize Cases, and of course they know it to be a settled rule that war can not be said to exist where the civil courts are open. They will not set up the absurd plea of necessity, for they are well aware that it would not be true in point of fact. They will hardly take the ground that any kind of necessity could give legal validity to that which the law forbids. This, therefore, must be their position: That although there was no war at the place where this commission sat, and no actual necessity for it, yet, if there was a war anywhere else to which the United States was a party, the technical effect of such war was to take the jurisdiction away from the civil courts and transfer it to Army officers.

[Gen. BUTLER:] We do not take that position.

[Mr. BLACK:] Then they can take no ground at all, for nothing else is left. I do not wonder to see them recoil from their own doctrine when its nakedness is held up to their eyes. But they must stand upon that or give up their cause. They may not state their proposition precisely as I state it; that is too plain a

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way of putting it. But in substance it is their doctrine—has been the doctrine of the Attorney General's Office ever since the advent of the present incumbent—and is the doctrine of their brief, printed and filed in this case. What else can they say? They will admit that the Constitution is not altogether without a meaning; that at a time of universal peace it imposes some kind of obligation upon those who swear to support it. If no war existed they would not deny the exclusive jurisdiction of the civil courts in criminal cases. How, then, did the military get jurisdiction in Indiana?

All men who hold the Attorney General's opinion to be true, answer that question I have put by saying that military jurisdiction comes from the mere existence of war, and it comes in Indiana only as the legal result of a war which is going on in Mississippi, Tennessee, or South Carolina. The Constitution is repealed, or its operation suspended, in one State because there is war in another. The courts are open, the organization of society is intact, the judges are on the bench and their process is not impeded, but their jurisdiction is gone. Why? Because, say our opponents, war exists, and the silent, legal, technical operation of that fact is to deprive all American citizens of their right to a fair trial.

That class of jurists and statesmen, who hold that the trial by jury is lost to the citizen during the existence of war, carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with

it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors, his papers may be searched without a warrant, his property may be confiscated behind his back, and he has no earthly means of redress. Nay; an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone with the rest of his rights. If you sanction that doctrine, what is to be the consequence?

I do not speak of what is past and gone; but in case of a future war what results will follow from your decision indorsing the Attorney General's views? They are very obvious. At the instant when the war begins our whole system of legal government will tumble into ruin, and if we are not all robbed, and kidnapped, and hanged, and drawn, and quartered we will owe our immunity, not to the Constitution and laws, but to the mere mercy or policy of those persons who may then happen to control the organized physical force of the country.

This certainly puts us in a most precarious condition; we must have war about half the time, do what we may to avoid it. The President or Congress can wantonly provoke a war whenever it suits the purpose of either to do so, and they can keep it going as long as they please, even after the actual conflict of arms is over. When Peace woos them they can ignore her existence, and thus they can make war a chronic condition of the country and the slavery of the people perpetual. Nay, we are at the mercy of any foreign

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potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

To me this seems the wildest delusion that ever took possession of a human brain. If there be one principle of political ethics more universally acknowledged than another it is that war, and especially civil war, can be justified only when it is undertaken to vindicate and uphold the legal and constitutional rights of the people, not to trample them down. He who carries on a system of wholesale slaughter for any other purpose must stand without excuse before God or man. In a time of war more than at any other time public liberty is in the hands of the public officers. And she is there in double trust—first, as they are citizens, and therefore bound to defend her by the common obligation of all citizens; and, next, as they are her special guardians—

Who should against her murderers shut the door,
Not bear the knife themselves.

The opposing argument, when turned into plain English, means this, and this only: That when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they may take advantage of the blindness produced by the blow to sneak behind it and stab it in the back.

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The convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us to wander about in a howling wilderness of anarchy, without a lamp to our feet or a guide to our path. Another thing proves their actual intent still more strikingly. They required that every man in any kind of public employment, State or National, civil or military, should swear, without reserve or qualification, that he would support the Constitution.

Surely our ancestors had too much regard for the moral and religious welfare of their posterity to impose upon them an oath like that, if they intended and expected it to be broken half the time. The oath of an officer to support the Constitution is as simple as that of a witness to tell the truth in a court of justice. What would you think of a witness who should attempt to justify perjury upon the ground that he had testified when civil war was raging, and he thought that by swearing to a lie he might promote some public or private object connected with the strife?

No, no, the great men who made this country what it is—the heroes who won her independence and the statesmen who settled her institutions—had no such notions in their minds. Washington deserved the lofty praise bestowed upon him by the President of Congress when he resigned his commission—that he

had always regarded the rights of the civil authority through all changes and through all disasters. When his duty as President afterwards required him to arm the public force to suppress a rebellion in western Pennsylvania, he never thought that the Constitution was abolished, by virtue of that fact, in New Jersey, or Maryland, or Virginia. It would have been a dangerous experiment for an adviser of his at that time, or at any time, to propose that he should deny a citizen his right to be tried by a jury, and substitute in place of it a trial before a tribunal composed of men elected by himself from among his own creatures and dependents. You can well imagine how that great heart would have swelled with indignation at the bare thought of such an insulting outrage upon the liberty and law of his country.

In the War of 1812, the man emphatically called the Father of the Constitution was the supreme Executive Magistrate. Talk of perilous times! There was the severest trial this Union ever saw. That was no half-organized rebellion on the one side of the conflict, to be crushed by the hostile millions and unbounded resources of the other. The existence of the Nation was threatened by the most formidable military and naval power then upon the face of the earth. Every town upon the northern frontier, upon the Atlantic seaboard and upon the Gulf coast was in daily and hourly danger. The enemy had penetrated the heart of Ohio. New York, Pennsylvania, and Virginia were all of them threatened from the west as well as the

east. This Capitol was taken, and burned, and pillaged, and every member of the Federal administration was a fugitive before the invading army. Meanwhile, party spirit was breaking out into actual treason all over New England. Four of those States refused to furnish a man or a dollar even for their own defense. Their public authorities were plotting the dismemberment of the Union, and individuals among them were burning blue lights upon the coast as a signal to the enemy's ships. But in all this storm of disaster, with foreign war in his front, and domestic treason on his flank, Madison gave out no sign that he would aid Old England and New England to break up this government of laws. On the contrary, he and all his supporters, though compassed round with darkness and with danger, stood faithfully between the Constitution and its enemies—

To shield it, and save it, or perish there, too.

The framers of the Constitution and all their contemporaries died and were buried; their children succeeded them and continued on the stage of public affairs until they, too—

Lived out their lease of life, and paid their breath
To time and mortal custom;

and a third generation was already far on its way to the grave before this monstrous doctrine was conceived or thought of, that public officers all over the country might disregard their oaths whenever a war or a rebellion was commenced.

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Our friends on the other side are quite conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. Their brief gives notice that, while the Constitution, and the Acts of Congress, and Magna Charta, and the common law, and all the rules of natural justice shall remain under foot; they will try American citizens according to the law of nations! But the law of nations takes no notice of the subject. If that system did contain a special provision that a government might hang one of its own citizens without judge or jury, it would still be competent for the American people to say, as they have said, that no such thing should ever be done here. That is my answer to the law of nations.

But then they tell us that the laws of war must be treated as paramount. Here they become mysterious. Do they mean that code of public law which defines the duties of two belligerent parties to one another, and regulates the intercourse of neutrals with both? If yes, then it is simply a recurrence to the law of nations, which has nothing on earth to do with the subject. Do they mean that portion of our municipal code which defines our duties to the Government in war as well as in peace? Then they are speaking of the Constitution and laws, which declare in plain words that the Government owes every citizen a fair legal trial, as much as the citizen owes obedience to the Government. They are in search of an argument under difficulties. When they appeal to international

law, it is silent; and when they interrogate the law of the land, the answer is an unequivocal contradiction of their whole theory.

The Attorney General tells us that all persons whom he and his associates choose to denounce for giving aid to the rebellion are to be treated as being themselves a part of the rebellion—they are public enemies, and therefore they may be punished without being found guilty by a competent court or a jury. This convenient rule would outlaw every citizen the moment he is charged with a political offense. But political offenders are precisely the class of persons who most need the protection of a court and jury, for the prosecutions against them are most likely to be unfounded both in fact and in law. Whether innocent or guilty, to accuse is to convict them before the ignorant and bigoted men who generally sit in military courts. But this court decided in the Prize Cases that all who live in the enemy's territory are public enemies, without regard to their personal sentiments or conduct; and the converse of the proposition is equally true—that all who reside inside of our own territory are to be treated as under the protection of the law. If they help the enemy they are criminals, but they can not be punished without legal conviction.

You have heard much (and you will hear more very soon) concerning the natural and inherent right of the Government to defend itself without regard to law. This is wholly fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defense

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of his authority against the opposition of his own subjects or others; and that is precisely what makes him a despot. But in a limited monarchy the prince must confine himself to a legal defense of his government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be hurled from his throne, and dragged to the block or driven into exile. This principle was sternly enforced in the cases of Charles I and James II, and we have it announced on the highest official authority here that the Queen of England can not ring a little bell on her table and cause a man by her arbitrary order to be arrested under any pretense whatever. If that be true there, how much more true must it be here, where we have no personal sovereign, and where our only Government is the Constitution and laws? A violation of law, on pretense of saving such a Government as ours, is not self-preservation, but suicide.

Salus populi suprema lex. Observe it is not *salus regis*: the safety of the people, not the safety of the ruler, is the supreme law. When those who hold the authority of the Government in their hands behave in such manner as to put the liberties and rights of the people in jeopardy, the people may rise against them and overthrow them without regard to that law which requires obedience to them. The maxim is revolutionary, and expresses simply the right to resist tyranny without regard to prescribed forms. It can

never be used to stretch the powers of government against the people.

If this Government of ours has no power to defend itself without violating its own laws, it carries the seeds of destruction in its own bosom; it is a poor, weak, blind, staggering thing, and the sooner it tumbles over the better. But it has a most efficient legal mode of protecting itself against all possible danger. It is clothed from head to foot in a complete panoply of defensive armor. What are the perils which may threaten its existence? I am not able at this moment to think of more than these which I am about to mention: Foreign invasion, domestic insurrection, mutiny in the Army and Navy, corruption in the civil administration, and last, but not least, criminal violations of its laws committed by individuals among the body of the people. Have we not a legal mode of defense against all these? Yes; military force repels invasion and suppresses insurrection; you preserve discipline in the Army and Navy by means of courts-martial; you preserve the purity of the civil administration by impeaching dishonest magistrates; and crimes are prevented and punished by the regular judicial authorities. You are not merely compelled to use these weapons against your enemies, because they and they only are justified by the law; you ought to use them because they are more efficient than any other, and less liable to be abused.

There is another view of the subject which settles all controversy about it. No human being in this

country can exercise any kind of public authority which is not conferred by law; and under the United States it must be given by the express words of a written statute. Whatever is not so given is withheld, and the exercise of it is positively prohibited. Courts-martial in the Army and Navy are authorized; they are legal institutions; their jurisdiction is limited, and their whole code of procedure is regulated by Act of Congress. Upon the civil courts all the jurisdiction they have or can have is bestowed by law; and if one of them goes beyond what is written, its action is *ultra vires* and void. But a military commission is not a court-martial, and it is not a civil court. It is not governed by the law which is made for either, and has no law of its own. Within the last five years we have seen, for the first time, self-constituted tribunals not only assuming power which the law did not give them, but thrusting aside the regular courts to which the power was exclusively given.

What is the consequence? This terrible authority is wholly undefined, and its exercise is without any legal control. Undelegated power is always unlimited. The field that lies outside of the Constitution and laws has no boundary. Thierry, the French historian of England, says that when the crown and scepter were offered to Cromwell he hesitated for several days, and answered, "Do not make me a king; for then my hands will be tied up by the laws which define the duties of that office; but make me protector of the commonwealth, and I can do what I please; no statute restrain-

ing and limiting the royal prerogative will apply to me." So these commissions have no legal origin and no legal name by which they are known among the children of men; no law applies to them; and they exercise all power for the paradoxical reason that none belongs to them rightfully.

Ask the Attorney General what rules apply to military commissions in the exercise of their assumed authority over civilians. Come, Mr. Attorney, "gird up thy loins now like a man; I will demand of thee, and thou shalt declare unto me if thou hast understanding." How is a military commission organized? What shall be the number and rank of its members? What offenses come within its jurisdiction? What is its code of procedure? How shall witnesses be compelled to attend it? Is it perjury for a witness to swear falsely? What is the function of the Judge Advocate? Does he tell the members how they must find, or does he only persuade them to convict? Is he the agent of the Government, to command them what evidence they shall admit and what sentence they shall pronounce; or does he always carry his point, right or wrong, by the mere force of eloquence and ingenuity? What is the nature of their punishment? May they confiscate property and levy fines as well as imprison and kill? In addition to strangling their victim, may they also deny him the last consolations of religion, and refuse his family the melancholy privilege of giving him a decent grave?

To none of these questions can the Attorney General

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make a reply, for there is no law on the subject. He will not attempt to "darken counsel by words without knowledge," and therefore, like Jacob, he can only lay his hand upon his mouth and keep silence.

The power exercised through those military commissions is not only unregulated by law, but it is incapable of being so regulated. What is it that you claim, Mr. Attorney? I will give you a definition, the correctness of which you will not attempt to gainsay. You assert the right of the Executive Government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that Government or its paid dependents may choose to impute an offense. This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It has been exercised by the great and small oppressors of mankind ever since the days of Nimrod. It operates in different ways; the tools it uses are not always the same; it hides its hideous features under many disguises; it assumes every variety of form;

It can change shapes with Proteus for advantages,
And set the murderous Machiavel to school.

But in all its mutations of outward appearance it is still identical in principle, object, and origin. It is always the same great engine of despotism which Hamilton described it to be.

Under the old French monarchy the favorite fashion of it was a *lettre de cachet*, signed by the king, and this

would consign the party to a loathsome dungeon until he died, forgotten by all the world. An imperial ukase will answer the same purpose in Russia. The most faithful subject of that amiable autocracy may lie down in the evening to dream of his future prosperity, and before daybreak he will find himself between two dragoons on his way to the mines of Siberia. In Turkey the verbal order of the Sultan or any of his powerful favorites will cause a man to be tied up in a sack and cast into the Bosphorus. Nero accused Peter and Paul of spreading a "pestilent superstition," which they called the Gospel. He heard their defense in person and sent them to the cross. Afterwards he tried the whole Christian church in one body, on a charge of setting fire to the city, and he convicted them, though he knew not only that they were innocent but that he himself had committed the crime. The judgment was followed by instant execution; he let loose the Prætorian guards upon men, women, and children, to drown, butcher, and burn them. Herod saw fit, for good political reasons, closely affecting the permanence of his reign in Judea, to punish certain possible traitors in Bethlehem by anticipation. This required the death of all the children in that city under two years of age. He issued his "general order"; and his provost marshal carried it out with so much alacrity and zeal that in one day the whole land was filled with mourning and lamentation.

Macbeth understood the whole philosophy of the subject. He was an unlimited monarch. His power

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to punish for any offense or for no offense at all was as broad as that which the Attorney General claims for himself and his brother officers under the United States. But he was more cautious how he used it. He had a dangerous rival, from whom he apprehended the most serious peril to the "life of his government." The necessity to get rid of him was plain enough, but he could not afford to shock the moral sense of the world by pleading political necessity for a murder. He must—

Mask the business from the common eye.

Accordingly he sent for two enterprising gentlemen, whom he took into his service upon liberal pay—"made love to their assistance"—and got them to deal with the accused party. He acted as his own judge advocate. He made a most elegant and stirring speech to persuade his agents that Banquo was their oppressor, and had "held them so under fortune" that he ought to die for that alone. When they agreed that he was their enemy, then said the king:

So is he mine, and though I could
With barefaced power sweep him from my sight
And bid my will avouch it; yet I must not,
For certain friends, who are both his and mine,
Whose loves I may not drop.

For these, and "many weighty reasons" besides, he thought it best to commit the execution of his design to a subordinate agency. The commission thus or-

ganized in Banquo's case sat upon him that very night, at a convenient place beside the road where it was known he would be traveling; and they did precisely what the Attorney General says the military officer may do in this country—they took and killed him, because their employer at the head of the government wanted it done, and paid them for doing it out of the public treasury.

But of all the persons that ever wielded this kind of power, the one who went most directly to the purpose and object of it was Lola Montez. She reduced it to the elementary principle. In 1848, when she was minister and mistress to the King of Bavaria, she dictated all the measures of the Government. The times were troublesome. All over Germany the spirit of rebellion was rising; everywhere the people wanted to see a first-class revolution, like that which had just exploded in France. Many persons in Bavaria disliked to be governed so absolutely by a lady of the character which Lola Montez bore, and some of them were rash enough to say so. Of course that was treason, and she went about to punish it in the simplest of all possible ways. She bought herself a pack of English bulldogs, trained to tear the flesh, and mangle the limbs, and lap the lifeblood; and with these dogs at her heels, she marched up and down the streets of Munich with a most majestic tread, and with a sense of power which any Judge Advocate in America might envy. When she saw any person whom she chose to denounce for "thwarting the Government," or "using disloyal

language," her obedient followers needed but a sign to make them spring at the throat of their victim. It gives me unspeakable pleasure to tell you the sequel. The people rose in their strength, smashed down the whole machinery of oppression, and drove out into uttermost shame king, strumpet, dogs, and all. From that time to this neither man, woman, nor beast has dared to worry or kill the people of Bavaria.

All these are but so many different ways of using the arbitrary power to punish. The variety is merely in the means which a tyrannical government takes to destroy those whom it is bound to protect. Everywhere it is but another construction, on the same principle, of that remorseless machine by which despotism wreaks its vengeance on those who offend it. In a civilized country it nearly always uses the military force, because that is the sharpest and surest instrument that can be found for such a purpose. But in none of its forms can it be introduced into this country; we have no room for it; the ground here is all preoccupied by legal and free institutions.

Between the officers who have a power like this, and the people who are liable to become its victims, there can be no relation except that of master and slave. The master may be kind, and the slave may be contented in his bondage; but the man who can take your life, or restrain your liberty, or despoil you of your property at his discretion, either with his own hands or by means of a hired overseer, owns you and he can force you to serve him. All you are

and all you have, including your wives and children, are his property.

If my learned and very good friend, the Attorney General, had this right of domination over me, I should not be very much frightened, for I should expect him to use it as moderately as any man in all the world; but still I should feel the necessity of being very discreet. He might change in a short time. The thirst for blood is an appetite which grows by what it feeds upon. We can not know him by present appearances. Robespierre resigned a country judgeship in early life because he was too tender-hearted to pronounce sentence of death upon a convicted criminal. Caligula passed for a most amiable young gentleman before he was clothed with the imperial purple, and for about eight months afterwards. It was Trajan, I think, who said that absolute power would convert any man into a wild beast, whatever was the original benevolence of his nature. If you decide that the Attorney General holds in his own hands, or shares with others, the power of life and death over us all, I mean to be very cautious in my intercourse with him; and I warn you, the judges whom I am now addressing, to do likewise. Trust not to the gentleness and kindness which have always marked his behavior heretofore. Keep your distance; be careful how you approach him; for you know not at what moment or by what a trifle you may rouse the sleeping tiger. Remember the injunction of Scripture: "Go not near to the man who hath power to kill; and if thou come unto him, see that

thou make no fault, lest he take away thy life presently; for thou goest among snares and walkest upon the battlements of the city."

The right of the Executive Government to kill and imprison citizens for political offenses has not been practically claimed in this country, except in cases where commissioned officers of the Army were the instruments used. Why should it be confined to them? Why should not naval officers be permitted to share in it? What is the reason that common soldiers and seamen are excluded from all participation in the business? No law has bestowed the right upon Army officers more than upon other persons. If men are to be hung without that legal trial which the Constitution guarantees to them, why not employ commissions of clergymen, merchants, manufacturers, horse dealers, butchers, or drovers, to do it? It will not be pretended that military men are better qualified to decide questions of fact or law than other classes of people; for it is known, on the contrary, that they are, as a general rule, least of all fitted to perform the duties that belong to a judge.

The Attorney General thinks that a proceeding which takes away the lives of citizens without a constitutional trial is a most merciful dispensation. His idea of humanity as well as law is embodied in the bureau of military justice, with all its dark and bloody machinery. For that strange opinion he gives this curious reason: That the duty of the Commander in Chief is to kill, and unless he has this bureau and these

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commissions he must "butcher" indiscriminately, without mercy or justice. I admit that if the Commander in Chief or any other officer of the Government has the power of an Asiatic king, to butcher the people at pleasure, he ought to have somebody to aid him in selecting his victims, as well as to do the rough work of strangling and shooting. But if my learned friend will only condescend to cast an eye upon the Constitution, he will see at once that all the executive and military officers are completely relieved by the provision that the life of a citizen shall not be taken at all until after legal conviction by a court and jury.

You can not help but see that military commissions, if suffered to go on, will be used for most pernicious purposes. I have criticized none of their past proceedings, nor made any allusion to their history in the last five years. But what can be the meaning of this effort to maintain them among us? Certainly not to punish actual guilt. All the ends of true justice are attained by the prompt, speedy, impartial trial which the courts are bound to give. Is there any danger that crime will be winked upon by the judges? Does anybody pretend that courts and juries have less ability to decide upon facts and law than the men who sit in military tribunals? The counsel in this cause will not insult you by even hinting such an opinion. What righteous or just purpose, then, can they serve? None, whatever.

But while they are utterly powerless to do even a

shadow of good, they will be omnipotent to trample upon innocence, to gag the truth, to silence patriotism, and crush the liberties of the country. They will always be organized to convict, and the conviction will follow the accusation as surely as night follows the day. The Government, of course, will accuse none before such a commission except those whom it predetermines to ruin and destroy. The accuser can choose the judges, and will certainly select those who are known to be the most ignorant, the most unprincipled, and the most ready to do whatever may please the power which gives them pay, promotion, and plunder. The willing witness can be found as easily as the superserviceable judge. The treacherous spy, and the base informer—those loathsome wretches who do their lying by the job—will stock such a market with abundant perjury, for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical government, with such an engine at its command, will shock the world with the enormity of its crimes. Plied as it may be by the arts of a malignant priesthood, and urged on by the madness of a raving crowd, it will be worse than the popish plot, or the French Revolution—it will be a combination of both, with Fouquier-Tinville on the bench, and Titus Oates in the witness's box. You can save us from this horrible fate. You alone can "deliver us from the body of this death." To that fearful extent is the destiny of this Nation in your hands.

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The Supreme Court recognized the supremacy of the right of trial by jury, and rendered its decision, releasing the prisoners from custody.

In no court of competent jurisdiction were they charged with crime; no jury of their peers had pronounced them guilty; and the law, in the splendor of its majesty and its glory, set them free.

The importance of this ruling of this judicial tribunal and its influence on the history of our Republic can hardly be overestimated.

In winning the cause of his clients, Mr. Black also won a notable victory for you and for me; and for generations yet to be.

His speech will live as long as language lasts, and his memory should be enshrined in the hearts of mankind.

The Tragic Trial of William Freeman

ON the night of March 12, 1846, Mr. and Mrs. John G. Van Nest, their baby, and Mrs. Wyckoff, the mother of Mrs. Van Nest, were brutally killed in their own home near Owasco Lake, New York. A farm laborer, named Van Arsdale, residing there at the time, was also severely but not fatally wounded.

After the perpetration of the deed, the assassin escaped on a stolen horse, which he rode for some distance, then heartlessly stabbed, procured another, and continued his flight. On the following day he was captured in Oswego County, and proved to be William Freeman, a negro about twenty-two years of age.

The detailed story of that grim night of crime overwhelmed the people, and in the frenzied excitement of the time, the wretched prisoner was almost deprived of the formality of a trial.¹

The storms of passion seemed unceasing. They swept the imperial scepter from Reason's trembling hand, and her throne was broken.

Vengeance, swift and sure, was the thought of the hour.

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Freeman was indicted on May 18th.

A plea of insanity was immediately filed for him by his counsel, and the issue thus made was submitted to a special jury, which rendered this verdict: "We find the prisoner sufficiently sane in mind and memory to distinguish between right and wrong."

William H. Seward, the leading counsel for the defense, had become thoroughly convinced that the negro was insane, and therefore not legally responsible for his acts. He contended that his conviction and execution under these circumstances would be even more horrible than the cruel deed which had shrouded the State in gloom.

Confident of this truth, Mr. Seward became intensely interested in the case. In a letter to a friend he had written: "There is a busy war around me to drive me from securing a fair trial for the negro Freeman. No priest (except one Universalist), no Levite, no lawyer, no man, no woman, has visited him. He is deaf, deserted, ignorant, and his conduct is unexplainable on any principle of sanity. It is natural he should turn to me to defend him. If he does, I shall do so. This will raise a storm of prejudice and passion which will try the fortitude of my friends. I care not whether I am to be ever forgiven for it or not."

Mr. Seward was prophetic. Drawn on the canvas of the public mind [was but a single picture: the savage butchery of man, woman and child, and

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the newly-made graves on the western shores of Owasco Lake.

There was a universal demand for the execution of the assassin. Mr. Seward himself was at times in extreme danger of personal attack.

On July 6th, the case proceeded to trial on its merits.

The prosecution was represented by Attorney General John Van Buren and Lumen Sherwood. Mr. Seward was assisted in the defense by David Wright, Christopher Morgan, and Samuel Blatchford.

Mr. Seward made the closing appeal to the jury.

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MAY IT PLEASE THE COURT,—GENTLEMEN OF THE JURY:—

“Thou shalt not kill,” and “Whoso sheddeth man’s blood by man shall his blood be shed” are laws found in the code of that people who, although dispersed and distracted, trace their history to the creation; a history which records that murder was the first of human crimes.

The first of these precepts constitutes a tenth part of the jurisprudence which God saw fit to establish, at an early period, for the government of all mankind throughout all generations. The latter, of less universal obligation, is still retained in our system, although other States, as intelligent and refined, as secure and peaceful, have substituted for it the more benign prin-

ciple that good shall be returned for evil. I yield implicit submission to this law, and acknowledge the justice of its penalty, and the duty of courts and juries to give it effect.

In this case, if the prisoner *be* guilty of murder, I do not ask remission of punishment. If he *be* guilty, never was murderer *more* guilty. He has murdered, not only John G. Van Nest, but his hands are reeking with the blood of other, and numerous, and even more pitiable victims. The slaying of Van Nest, if a crime at all, was the cowardly crime of assassination. John G. Van Nest was a just, upright, virtuous man, of middle age, of grave and modest demeanor, distinguished by especial marks of the respect and esteem of his fellow-citizens. On his arm leaned a confiding wife, and they supported, on the one side, children to whom they had given being, and, on the other, aged and venerable parents, from whom they had derived existence. The assassination of such a man was an atrocious crime, but the murderer, with more than savage refinement, immolated on the same altar, in the same hour, a venerable and virtuous matron of more than three-score years, and her daughter, wife of Van Nest, mother of an unborn infant.

Nor was this all. Providence, which, for its own mysterious purposes, permitted these dreadful crimes, in mercy suffered the same arm to be raised against the sleeping orphan child of the butchered parents, and received it into Heaven. A whole family, just, gentle and pure, were thus, in their own house, in

the nighttime, without any provocation, without one moment's warning, sent by the murderer to join the assembly of the just; and even the laboring man, sojourning within their gates, received the fatal blade into his breast, and survives through the mercy, not of the murderer, but of God.

For William Freeman, as a murderer, I have no commission to speak. If he had silver and gold accumulated with the frugality of Croesus, and should pour it all at my feet, I would not stand an hour between him and the avenger. But for the innocent, it is my right, my duty to speak. If this sea of blood was *innocently* shed, then it is my duty to stand beside him until his steps lose their hold upon the scaffold.

"Thou shalt not kill" is a commandment addressed, not to him alone, but to me, to you, to the court, and to the whole community. There are no exceptions from that commandment, at least in civil life, save those of self-defense, and capital punishment for crimes in the due and just administration of the law. There is not only a question, then, whether the prisoner has shed the blood of his fellow man, but the question whether we shall unlawfully shed his blood. I should be guilty of murder if, in my present relation, I saw the executioner waiting for an insane man and failed to say, or failed to do in his behalf, all that my ability allowed. I think it has been proved of the prisoner at the bar, that during all this long and tedious trial, he has had no sleepless nights, and that even in the daytime, when he retires from these halls to his lonely

cell, he sinks to rest, like a wearied child, on the stone floor, and quietly slumbers till aroused by the constable with his staff, to appear again before the jury. His counsel enjoy no such repose. Their thoughts by day and their dreams by night are filled with oppressive apprehensions that, through their inability or neglect, he may be condemned.

I am arraigned before you for undue manifestations of zeal and excitement. My answer to all such charges shall be brief. When this cause shall have been committed to you, I shall be happy indeed, if it shall appear that my only error has been, that I have felt too much, thought too intensely, or acted too faithfully.

If *my* error would thus be criminal, how great would *yours* be if you should render an unjust verdict? Only four months have elapsed since an outraged people, distrustful of judicial redress, doomed the prisoner to immediate death. Some of you have confessed that you approved that lawless sentence. All men now rejoice that the prisoner was saved for this solemn trial. But this trial would be as criminal as that precipitate sentence if, through any willful fault or prejudice of yours, it should prove but a mockery of justice. If any prejudice of witnesses, or the imagination of counsel, or any ill-timed jest shall at any time have diverted your attention; or if any prejudgment which you may have brought into the jury box, or any cowardly fear of popular opinion shall have operated to cause you to deny to the prisoner that dispassionate

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consideration of his case which the laws of God and man exact of you, and if, owing to such an error, this wretched man fall from among the living, what will be your crime? You will have violated the commandment, "Thou shalt not kill."

It is not the form or letter of the trial by jury that authorizes you to send your fellow man to his dread account, but it is the spirit that sanctifies that glorious institution; and if, through pride, passion, timidity, weakness, or any cause, you deny the prisoner one iota of all the defense to which he is entitled by the law of the land, you yourselves, whatever his guilt may be, will have broken the commandment, "Thou shalt do no murder."

There is not a corrupt or prejudiced witness, there is not a thoughtless or heedless witness, who has testified what was not true in spirit, or what was not wholly true, or who has suppressed any truth, who has not offended against the same injunction.

Nor is the court itself above the commandment. If these judges have been influenced by the excitement which has brought this vast assemblage here, and under such influence, or under any other influence, have committed voluntary error, and have denied to the prisoner, or shall hereafter deny to him, the benefit of any fact or any principle of law, then this court will have to answer for the deep transgression, at the bar at which we all shall meet again. When we appear there, none of us can plead that we were insane and knew not what we did; and by just so

much as our ability and knowledge exceed those of this wretch, whom the world regards as a fiend in human shape, will our guilt exceed his, if we be guilty.

I plead not for a murderer. I have no inducement, no motive to do so. I have addressed my fellow-citizens in many various relations, when rewards of wealth and fame awaited me. I have been cheered on other occasions by manifestations of popular approbation and sympathy; and where there was no such encouragement, I had at least the gratitude of him whose cause I defended. But I speak now in the hearing of a people who have prejudged the prisoner, and condemned me for pleading in his behalf. He is a convict, a pauper, a negro, without intellect, sense, or emotion. My child, with an affectionate smile, disarms my care-worn face of its frown whenever I cross my threshold. The beggar in the street obliges me to give, because he says "God bless you" as I pass. My dog caresses me with fondness if I will but smile on him. My horse recognizes me when I fill his manger. But what reward, what gratitude, what sympathy and affection can I expect here?

There the prisoner sits. Look at him. Look at the assemblage around you. Listen to their ill-suppressed censures and their excited fears, and tell me where, among my neighbors or my fellow men, where, even in his heart, I can expect to find the sentiment, the thought, not to say of reward or of acknowledgment, but even of recognition. I sat

here two weeks during the preliminary trial. I stood here, between the prisoner and the jury, nine hours and pleaded for the wretch that he was insane and did not even know he was on trial; and, when all was done the jury thought, at least eleven of them thought, that I had been deceiving them, or was self-deceived. They read signs of intelligence in his idiotic smile, and of cunning and malice in his stolid insensibility. They rendered a verdict that he was sane enough to be tried—a contemptible compromise verdict in a capital case; and then they looked on, with what emotions God and they only know, upon his arraignment. The District Attorney bade him rise, and, reading to him one indictment, asked him whether he wanted a trial, and the poor fool answered no. Have you counsel? No. And they went through the same mockery, the prisoner giving the same answers, until a third indictment was thundered in his ears, and he stood before the court silent, motionless, and bewildered. Gentlemen, you may think of this evidence what you please, bring in what verdict you can, but I asseverate, before Heaven and you, that, to the best of my knowledge and belief, the prisoner at the bar does not, at this moment, know why it is that my shadow falls on you instead of his own.

I speak with all sincerity and earnestness, not because I expect my opinion to have weight, but I would disarm the injurious impression that I am speaking merely as a lawyer speaks for his client. I

am not the prisoner's lawyer. I am, indeed, a volunteer in his behalf, but society and mankind have the deepest interest at stake. I am the lawyer for society, for mankind, shocked, beyond the power of expression, at the scene I have witnessed here of trying a maniac as a malefactor. In this, almost the first of such causes I have ever seen, the last I hope that I shall ever see, I wish that I could perform my duty with more effect. If I suffered myself to look at the volumes of testimony through which I have to pass, to remember my entire want of preparation, the pressure of time, and my wasted strength and energies, I should despair of acquitting myself as you and all good men will hereafter desire that I should have performed so sacred a duty. But, in the cause of humanity, we are encouraged to hope for divine assistance where human powers are weak.

As you all know, I provided for my way through these trials, neither gold nor silver in my purse, nor scrip; and when I could not think beforehand what I would say, I remembered that it was said to those who had a beneficent commission, that they should take no thought what they should say when brought before the magistrate, for, in that same hour, it should be given them what they should say, and it should not be they who should speak, but the spirit of their Father speaking in them.

You have promised, gentlemen, to be impartial. You will find it more difficult than you have supposed. Our minds are liable to be swayed by temporary in-

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fluences, and above all, by the influences of masses around us. At every stage of this trial, your attention has been diverted, as it will be hereafter, from the only question which is involved, by the eloquence of the counsel for the People, reminding you of the slaughter of that helpless and innocent family, and of the danger to which society is exposed by relaxing the rigors of the laws. Indignation against crime, and apprehensions of its recurrence, are elements on which public justice relies for the execution of the law. You must indulge that indignation. You cannot dismiss such apprehensions. You will, in common with your fellow-citizens, deplore the destruction of so many precious lives, and sympathize with mourning relations and friends. Such sentiments cannot be censured when operating upon the community at large, but they are deeply to be deplored when they are manifested in the jury box.

Then, again, a portion of this issue has been tried, imperfectly tried, unjustly tried, already. A jury of twelve men, you are told, have already rendered their verdict that the prisoner is *now* sane. The deference which right-minded men yield to the opinions of others, the timidity which weak men feel in dissenting from others, may tempt you to surrender your own independence. I warn you that that verdict is a reed which will pierce you through and through. That jury was selected without peremptory challenge. Many of the jurors entered the panel with settled opinions that the prisoner was not only guilty of the

homicide, but sane, and all might have entertained such opinions for all that the prisoner could do. It was a verdict founded on such evidence as could be hastily collected in a community where it required moral courage to testify for the accused. Testimony was excluded upon frivolous and unjust pretenses. The cause was submitted to the jury on the fourth of July, and under circumstances calculated to convey a malicious and unjust spirit into the jury box.

It was a strange celebration. The dawn of the day of independence was not greeted with cannon or bells. No lengthened procession was seen in our streets, nor were the voices of orators heard in our public halls. An intense excitement brought a vast multitude here, complaining of the delay and the expense of what was deemed an unnecessary trial, and demanding the sacrifice of a victim who had been spared too long already. For hours that assemblage was roused and excited by denunciations of the prisoner, and ridicule of his deafness, his ignorance, and his imbecility. Before the jury retired, the court was informed that they were ready to render the verdict required. One juror, however, hesitated. The next day was the Sabbath. The jury were called, and the court remonstrated with the dissentient, and pressed the necessity of a verdict. That juror gave way at last, and the bell which summoned our citizens to church for the evening service was the signal for the discharge of the jury, because they had agreed.

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Even thus a legal verdict could not be extorted. The eleven jurors, doubtless under an intimation from the court, compromised with the twelfth, and a verdict was rendered, not in the language of the law, that the prisoner was "not insane," but that he was "sufficiently sane, in mind and memory, to distinguish between right and wrong"; a verdict which implied that the prisoner was at least *partially* insane, was diseased in other faculties besides the memory, and partially diseased in that, and that, although he had mind and memory to distinguish between right and wrong in the abstract, he had not reason and understanding and will to regulate his conduct according to that distinction; in short, a verdict by which the jury unworthily evaded the question submitted to them, and cast upon the court a responsibility which it had no right to assume, but which it did nevertheless assume, in violation of the law.

That twelfth juror was afterwards drawn as a juror in this cause, and was challenged by the counsel for the People for partiality to the prisoner, and the challenged was sustained by the court, because—although he had, as the court says, pronounced by his verdict that the prisoner was sane—he then declared that he believed the prisoner insane, and would die in the jury box before he would render a verdict that he was sane. Last and chief of all objections to that verdict now, it has been neither pleaded nor proved here, and therefore, is not in evidence before you. I trust, then, that you will dismiss, to the contempt

of mankind, that jury and their verdict, thus equivocating upon law and science, health and disease, crime and innocence.

Again. An inferior standard of intelligence has been set up here as the standard of the negro race, and a false one as to the standard of the Asiatic race. The prisoner traces a divided lineage. On the paternal side his ancestry is lost among the tiger hunters on the gold coast of Africa, while his mother constitutes a portion of the small remnant of the Narragansett tribe. Hence, it is held, that the prisoner's intellect is to be compared with the depreciating standard of the African, and his passions with the violent and ferocious character erroneously imputed to the aborigines. Indications of manifest derangement, or at least of imbecility, approaching to idiocy, are therefore set aside, on the ground that they harmonize with the legitimate but degraded characteristics of the races from which he is descended.

You, gentlemen, have, or ought to have, lifted up your souls above the bondage of prejudices so narrow and so mean as these. The color of the prisoner's skin and the form of his features are not impressed upon the spiritual, immortal mind which works beneath. In spite of human pride, he is still your brother, and mine, in form and color accepted and approved by his Father, and yours, and mine, and bears equally with us the proudest inheritance of our race—the image of our Maker. Hold him then to be a man. Exact of him all the responsibilities which

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should be exacted under like circumstances if he belonged to the Anglo-Saxon race, and make for him all the allowances which, under like circumstances, you would expect for yourselves.

The prisoner was obliged—no, his counsel were obliged, by law, to accept the plea of *not guilty*, which the court directed to be entered in his behalf. That plea denies the homicide. If the law had allowed it, we would gladly have admitted all the murders of which the prisoner was accused, and have admitted them to be as unprovoked as they were cruel, and have gone directly before you on the only defense upon which we have insisted, or shall insist, or could insist, that he is irresponsible, because he was and is insane.

We labor, not only under these difficulties, but under the further embarrassment that the plea of insanity is universally suspected. It is the last subterfuge of the guilty, and so, is too often abused. But, however obnoxious to suspicion this defense is, there have been cases where it was true; and when true, it is, of all pleas, the most perfect and complete defense that can be offered in any human tribunal. Our Savior forgave His judges because "they knew not what they did." The insane man who has committed a crime knew not what he did. If this being, dyed with human blood, be *insane*, you and I, and even the children of our affections, are not more guiltless than he.

Is there reason to indulge a suspicion of fraud here? Look at this stupid, senseless fool, almost as inani-

mate as the clay moulded in the brick yard, and say, if you dare, that you are afraid of being deceived by him. Look at me. You all know me. Am I a man to engage in a conspiracy to deceive you and defraud justice? Look on us all, for although I began the defense of this cause alone, thanks to the generosity, to the magnanimity of an enlightened profession, I come out strong in the assistance of counsel never before attached to me in any relation, but strongly grappled to me now, by these new and endearing ties. Is any one of us a man to be suspected? The testimony is closed. Look through it all. Can suspicion or malice find in it any ground to accuse us of a plot to set up a false and fabricated defense?

I will give you, gentlemen, a key to every case where insanity has been wrongfully and yet successfully maintained. Gold, influence, popular favor, popular sympathy, raise that defense and make it impregnable. But you have never seen a poor, worthless, spiritless, degraded negro like *this* acquitted wrongfully. I wish this trial may prove that such an one can be acquitted rightfully. The danger lies here. There is not a white man or white woman who would not have been dismissed long since from the perils of such a prosecution, if it had only been proved that the offender was so ignorant and so brutalized as not to understand that the defense of insanity had been interposed.

If he feign, who has trained the idiot to perform this highest and most difficult of all intellectual achieve-

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ments? Is it I? Shakespeare and Cervantes only, of all mankind, have conceived and perfected a counterfeit of insanity. Is it I? Why is not the imposition exposed, to my discomfiture and the prisoner's ruin? Where was it done? Was it in public, here? Was it in secret, in the jail? His deafened ears could not hear me there, unless I were overheard by other prisoners, by jailers, constables, the sheriff, and a cloud of witnesses. Who has the keys of the jail? Have I? You have had sheriff, jailer, and the whole police upon the stand. Could none of these witnesses reveal our plot? Were there none to watch and report the abuse? When they tell you, or insinuate, gentlemen, that this man has been taught to feign insanity, they discredit themselves, as did the Roman sentinels, who, appointed to guard the sepulcher of our Savior, said, in excuse of the broken seal, that while they slept men came and rolled away the stone.

I advance towards the merits of the cause. The law which it involves will be found in the case of Kleim, tried for murder in 1844, before Judge Edmonds, of the first circuit, in the city of New York, reported in the *Journal of Insanity* for January, 1846, at page 261. I read from the report of the judge's charge:

He told the jury that there was no doubt that Kleim had been guilty of the killing imputed to him, and that under circumstances of atrocity and deliberation which were calculated to excite in their minds strong feelings of indignation against him. But they must beware how they permitted such feelings to influence their judgment. They

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must bear in mind that the object of punishment was not vengeance, but reformation; not to extort from a man an atonement for the life which he cannot give, but by the terror of the example, to deter others from the like offenses, and that nothing was so likely to destroy the public confidence in the administration of criminal justice, as the infliction of its pains upon one whom Heaven has already afflicted with the awful malady of insanity.

These words deserve to be written in letters of gold upon tablets of marble. Their reason and philosophy are apparent. If you send the lunatic to the gallows, society will be shocked by your inhumanity, and the advocates for the abolition of capital punishment will find their most effective argument in the fact that a jury of the country, through ignorance, or passion, or prejudice, have mistaken a madman for a criminal.

The report of Judge Edmonds's charge proceeds:

It was true that the plea of insanity was sometimes adopted as a cloak for crime, yet it was unfortunately equally true, that many more persons were unjustly convicted, to whom their unquestioned insanity ought to have been an unfailing protection.

This judicial answer to the argument that jurors are too likely to be swayed by the plea of insanity, is perfect and complete. Judge Edmonds further charged the jury that

it is by no means an easy matter to discover or define the line of demarkation where sanity ends and insanity begins,

and that it is often

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difficult for those most expert in the disease to detect or explain its beginning, extent or duration; that the classifications of the disease are in a great measure arbitrary, and the jury are not obliged to bring the case of the prisoner within any one of the classes, because the symptoms of the different kinds are continually mingling with each other.

The application of this rule will render the present case perfectly clear, because it appears from the evidence that the prisoner is laboring under a combination of *mania* or excited madness, with *dementia* or decay of the mind. Judge Edmonds furnishes you with a balance to weigh the testimony in the case in these words:

It is important that the jury should understand how much weight is to be given to the opinions of medical witnesses. The opinions of men who have devoted themselves to the study of *insanity* as a distinct department of medical science, and studied recent improvements and discoveries, especially when to that knowledge they have added the experience of personal care of the insane, can never be safely disregarded by courts and juries; and, on the other hand, the opinions of physicians who have devoted their particular attention to *disease* are not of any more value than the opinions of common persons.

This charge of Judge Edmonds furnishes a lamp to guide your feet, and throws a blazing light on your path. He acknowledges, in the first place, with distinguished independence for a judge and a lawyer, that

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the law, in its slow and cautious progress, still lags far behind the advance of true knowledge. An insane person is one who, at the time of committing the act, labored under such a defect of reason as not to know the nature and quality of the act he was doing, or if he did know it, did not know he was doing what was wrong; and the question is not whether the accused knew the difference between right and wrong *generally*, but whether he knew the difference between right and wrong in regard to the very act with which he is charged. If some controlling disease was, in truth, the acting power within him, which he could not resist, or if he had not a sufficient use of his reason to control the passions which prompted him, he is not responsible. But it must be an absolute dispossession of the free and natural agency of the mind. In the glowing but just language of Erskine: it is not necessary that reason should be hurled from her seat; it is enough that distraction sits down beside her, holds her trembling in her place and frightens her from her propriety.

Judge Edmonds proceeded:

And it must be borne in mind that the *moral* as well as *intellectual* faculties may be so disordered by the disease as to deprive the mind of its controlling and directing power. In order then, to establish a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that, if he commit the act, he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on

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the other hand, he have not intelligence enough to have a criminal intent and purpose, and if his moral or intellectual powers are either so deficient that he has not sufficient will, conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent.

The learned judge recommended to the jury, as aids to a just conclusion, to consider the extraordinary and unaccountable alteration in the prisoner's whole mode of life; the inadequacy between the slightness of the cause and the magnitude of the offense; the recluse and ascetic life which he has led; his invincible repugnance to all intercourse with his fellow creatures; his behavior and conduct at the time the act was done, and subsequently during his confinement; and the stolid indifference which he alone had manifested during the whole progress of a trial upon which his life or death depended.

Kleim was acquitted and sent, according to law, to the State Lunatic Asylum at Utica. The superintendent of the asylum, in a note to this report, states that Kleim is uniformly mild and pleasant; has not asked a question, or spoken or learned the name of any one; seems very imperfectly to recollect the murder or the trial; says he was put in prison; does not know what for; and was taken to the court, but had no trial; that his bodily health is good, but that his mind is nearly gone—quite demented.

You cannot fail, gentlemen of the jury, to remark the extraordinary similarity between the case of

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Kleim, as indicated in the charge of Judge Edmonds, and that of the prisoner at the bar. If I were sure you would receive such a charge, and be guided by it, I might rest here, and defy the eloquence of the Attorney General.

The proof of insanity in this case is of the same nature, and the disease in the same form as in the case of Kleim. The only difference is, that the evidence here is a thousand times more conclusive. But Judge Edmonds does not preside here. Kleim was a white man, Freeman is a negro. Kleim set fire to a house, to burn only a poor obscure woman and her child. Here the madman destroyed a whole family, rich, powerful, honored, respected and beloved. Kleim was tried in the city of New York, and the community engaged in their multiplied avocations, and heedless of a crime not infrequent there, and occurring in humble life, did not overawe and intimidate the court, the jury, or the witnesses. Here a panic has paralyzed humanity. No man or woman feels safe until the maniac shall be extirpated from the face of the earth. Kleim had the sympathies of men and women, willing witnesses, advocates sustained and encouraged by popular favor, and an impartial jury. Freeman is already condemned by the tribunal of public opinion, and has reluctant and timorous witnesses, counsel laboring under embarrassments plainly to be seen, and a jury whose impartiality is yet to be proved.

The might that slumbered in this maniac's arm was exhausted in the paroxysm which impelled him to his

dreadful deeds. Yet, an excited community, whose terror has not yet culminated, declare, that whether sane or insane, he must be executed, to give safety to your dwellings and theirs. I must needs then tell you the law, which will disarm such cowardly fear. If you acquit the prisoner, he cannot go at large, but must be committed to jail, to be tried by another jury for a second murder. Your dwellings, therefore, will be safe. If such a jury find him sane, he will then be sent to his fearful account, and your dwellings will be safe. If acquitted, he will be remanded to jail, to await a third trial, and your dwellings will be safe. If that jury convict, he will then be executed, and your dwellings will be safe. If they acquit, he will still be detained, to answer a fourth murder, and your dwellings will be safe. Whether the fourth jury acquit or convict, your dwellings will still be safe; for, if they convict, he will then be cut off, and if they acquit, he must, according to the law of the land, be sent to the lunatic asylum, there to be confined for life.

You may not slay him then for the public security, because the public security does not demand the sacrifice. No security, for home or hearth, can be obtained by judicial murder. God will abandon him, who, through cowardly fear, becomes such a murderer. *I* also stand for the security of the homes and hearths of my fellow citizens, and have as deep an interest, and as deep a stake as any one of them. There are my home and hearth exposed to every danger that can threaten theirs, but I know that security cannot exist

for any, if feeble man undertakes to correct the decrees of Providence.

The counsel for the People admit, in the abstract, that insanity excuses crime, but they insist on rules for the regulation of insanity, to which that disease can never conform itself. Dr. Fosgate testified that the prisoner was insane. He was asked by the Attorney General, "What if the law, nevertheless, hold to be criminal that same state of mind which you pronounce insanity?" He answered with high intelligence and great moral firmness, "The law cannot alter the constitution of man as it was given him by his Maker." Insanity, such as the counsel for the People would tolerate, never did and never will exist. They bring its definition from Coke, Blackstone and Hale, and it requires that by reason either of natural infirmity or of disease, the wretched subject shall be unable to count twenty, shall not know his father or mother and shall have no more reason or thought than a brute beast.

According to the testimony of Dr. Spencer, and the claim of the Attorney General, an individual is not insane if you find any traces or glimmerings of the several faculties of the human mind, or of the more important ones. Dr. Spencer has found in the prisoner memory of his wrongs and sufferings, choice between bread and animal food, hunger to be appeased, thirst to be quenched, love of combat, imperfect knowledge of money, anger and malice. All of Dr. Spencer's questions to the accused show, that in looking for insanity,

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he demands an entire obliteration of all conception, attention, imagination, association, memory, understanding and reason, and everything else. There never was an idiot so low, never a diseased man so demented.

You might as well expect to find a man born without eyes, ears, nose, mouth, hands and feet, or deprived of them all by disease, and yet surviving, as to find such an idiot, or such a lunatic, as the counsel for the People would hold irresponsible. The reason is, that the human mind is not capable, while life remains, of such complete obliteration. What is the human mind? It is immaterial, spiritual, immortal; an emanation of the divine intelligence, and if the frame in which it dwells had preserved its just and natural proportions, and perfect adaptation, it would be a pure and heavenly existence. But that frame is marred and disordered in its best estate. The spirit has communication with the world without, and acquires imperfect knowledge only through the half-opened gates of the senses. If, from original defects, or from accidental causes, the structure be such as to cramp or restrain the mind, it becomes or appears to be weak, diseased, vicious and wicked.

I know one who was born without sight, without hearing, and without speech, retaining the faculties of feeling and smell. That child was, and would have continued to be, an idiot, incapable of receiving or communicating thoughts, feelings or affections; but tenderness unexampled, and skill and assiduity unparalleled,

have opened avenues to the benighted mind of Laura Bridgman, and developed it into a perfect and complete human spirit, consciously allied to all its kindred, and aspiring to Heaven. Such is the mind of every idiot, and of every lunatic, if you can only open the gates and restore the avenues of the senses; and such is the human soul when deranged and disordered by disease, imprisoned, confounded, benighted. That disease is insanity.

Doth not the idiot eat? Doth not the idiot drink? Doth not the idiot know his father and his mother? He does all this because he is a man. Doth he not smile and weep? and think you he smiles and weeps for nothing? He smiles and weeps because he is moved by human joys and sorrows, and exercises his reason, however imperfectly. Hath not the idiot anger, rage, revenge? Take from him his food, and he will stamp his feet and throw his chains in your face. Think you he doth this for nothing? He does it all because he is a man, and because, however imperfectly, he exercises his reason. The lunatic does all this, and if not quite demented, all things else that man, in the highest pride of intellect, does or can do. He only does them in a different way. You may pass laws for his government. Will he conform? Can he conform? What cares he for your laws? He will not even plead; *he cannot* plead his disease in excuse. You must interpose the plea for him, and if you allow it, he, when redeemed from his mental bondage, will plead for you, when he returns to your Judge and his. If you deny

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his plea, he goes all the sooner, freed from imperfection, and with energies restored, into the presence of that Judge. You must meet him there, and then, no longer bewildered, stricken and dumb, he will have become as perfect, clear and bright as those who reviled him in his degradation, and triumphed in his ruin.

And now what is insanity? Many learned men have defined it for us, but I prefer to convey my idea of it in the simplest manner. Insanity is a disease of the body, and I doubt not, of the brain. The world is astonished to find it so. They thought for almost six thousand years, that it was an affection of the mind only. Is it strange that the discovery should have been made so late? You know that it is easier to move a burden, upon two smooth rails on a level surface than over the rugged ground. It has taken almost six thousand years to learn that. But moralists argue that insanity shall not be admitted as a physical disease, because it would tend to exempt the sufferer from responsibility, and because it would expose society to danger. But who shall know, better than the Almighty, the ways of human safety, and the bonds of human responsibility?

And is it strange that the brain should be diseased? What organ, member, bone, muscle, sinew, vessel or nerve is not subject to disease? What is a physical man, but a frail, perishing body, that begins to decay as soon as it begins to exist? What is there of animal existence here on earth exempt from disease and decay? Nothing. The world is full of disease, and

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that is the great agent of change, renovation and health.

And what wrong or error can there be in supposing that the mind may be so affected by disease of the body as to relieve man from responsibility? You will answer it would not be safe. But who has assured you of safety? Is not the way of life through dangers lurking on every side, and though you escape ten thousand perils must you not fall at last? Human life is not safe, nor intended to be safe, against the elements. Neither is it safe, nor intended to be safe, against the moral elements of man's nature. It is not safe against pestilence or against war, against the thunderbolt of heaven, or against the blow of the maniac. But comparative safety can be secured, if you will be wise. You can guard against war, if you will cultivate peace. You can guard against the lightning, if you will learn the laws of electricity, and raise the protecting rod. You will be safe against the maniac, if you will watch the causes of madness, and remove them. Yet after all, there will be danger enough from all these causes to remind you that on earth you are not immortal.

Although my definition would not perhaps be strictly accurate, I should pronounce insanity to be a derangement of the mind, character and conduct, resulting from bodily disease. I take this word derangement, because it is one in common everyday use. We all understand what is meant when it is said that anything is ranged or arranged. The houses on a

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street are ranged, if built upon a straight line. The fences on your farms are ranged. A tower, if justly built, is ranged; that is, it is ranged by the plummet. It rises in a perpendicular range from the earth. A file of men marching in a straight line are in range. "Range yourselves, men," though not exactly artistical, is not an uncommon word of command. Now what do we mean when we use the word "*deranged*"? Manifestly that a thing is not ranged, is not arranged, is out of range. If the houses on the street be built irregularly, they are deranged. If the fences be inclined to the right or left, they are deranged. If there be an unequal pressure on either side, the tower will lean, that is, it will be deranged. If the file of men become irregular, the line is deranged.

So if a man be insane. There was a regular line which he was pursuing, not the same line which you or I follow, for all men pursue different lines, and every sane man has his own peculiar path. All these paths are straight, and all are ranged, though all divergent. It is easy enough to discover when the street, the fence, the tower, or the martial procession is deranged; but it is quite another thing to determine when the course of an individual life has become deranged. We deal not then with geometrical or material lines, but with an imaginary line. We have no physical objects for landmarks. We trace the line backward by the light of imperfect and satisfactory evidence, which leaves it a matter almost of speculation whether there has been a departure or not. In some cases, indeed, the task is

easy. If the fond mother becomes the murderer of her offspring, it is easy to see that she is deranged. If the pious man, whose steps were firm and whose pathway led straight to Heaven, sinks without temptation into criminal debasement, it is easy to see that he is deranged. But in cases where no natural instinct or elevated principle throws its light upon our research, it is often the most difficult and delicate of all human investigations to determine when a person is deranged.

We have two tests. *First*, to compare the individual after the supposed derangement with himself as he was before. *Second*, to compare his course with those ordinary lines of human life which we expect sane persons, of equal intelligence and similarly situated, to pursue.

If derangement, which is insanity, means only what we have assumed, how absurd is it to be looking to detect whether memory, hope, joy, fear, hunger, thirst, reason, understanding, wit, and other faculties remain! So long as life lasts they never cease to abide with man, whether he pursue his straight and natural way, or the crooked and unnatural course of the lunatic. If he be diseased, his faculties will not cease to act. They will only act differently.

It is contended here that the prisoner is not deranged, because he performed his daily task in the State prison, and his occasional labor afterwards; because he grinds his knives, fits his weapons, and handles the file, the ax, and the saw, as he was in-

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structed, and as he was wont to do. Now the lunatic asylum at Utica has not an idle person in it, except the victims of absolute and incurable dementia, the last and worst stages of all insanity. Lunatics are almost the busiest people in the world. They have their prototypes only in children. One lunatic will make a garden, another drive the plow, another gather flowers. One writes poetry; another, essays; another, orations. In short, lunatics eat, drink, sleep, work, fear, love, hate, laugh, weep, mourn, die. They do all things that sane men do, but do them in some peculiar way. It is said, however, that this prisoner has hatred and anger, that he has remembered his wrongs, and nursed and cherished revenge; wherefore, he cannot be insane. Cowper, a moralist who had tasted the bitter cup of insanity, reasoned otherwise:

But violence can never longer sleep
Than human passions please. In ev'ry heart
Are sown the sparks that kindle fiery war;
Occasion needs but fan them and they blaze,
The seeds of murder in the breast of man.

Melancholy springs oftenest from recalling and brooding over wrong and suffering. Melancholy is the first stage of madness, and it is only recently that the less accurate name of monomania has been substituted in the place of melancholy. Melancholy is the foster mother of anger and revenge. Until 1830, our statutory definition of lunatics was in the terms, "*disorderly persons, who, if left at large, might endanger the lives of*

others." Our laws now regard them as *merely* disorderly and dangerous, and society acquiesces, unless madness rise so high that the madman slay his imaginary enemy, and then he is pronounced sane.

The prisoner lived with Nathaniel Lynch, at the age of eight or nine, and labored occasionally for him during the last winter. Lynch visited him in the jail, and asked him if he remembered him, and remembered living with him. The prisoner answered yes. Lynch asked the prisoner whether he was whipped while there, and by whom, and why. From his answers it appeared that he had been whipped by his mistress for playing truant, and that he climbed a rough board fence in his night clothes and fled to his mother. Upon this evidence, the learned professor from Geneva College, Dr. Spencer, builds an argument that the prisoner has conception, sensation, memory, imagination, and association, and is most competent for the scaffold. Now here are some verses to which I would invite the doctor's attention:

Shut up in dreary gloom, like convicts are,
In company of murderers! Oh, wretched fate!
If pity e'er extended through the frame,
Or sympathy's sweet cordial touched the heart,
Pity the wretched maniac who knows no blame,
Absorbed in sorrow, where darkness, poverty, and every
curse impart.

Here is evidence, not merely of memory and other faculties, but of what we call genius. Yet these verses

are a sad effusion of Thomas Lloyd, a man-slaying maniac in Bedlam.

The first question of fact here, gentlemen, as in every case where insanity is gravely insisted upon, is this: Is the prisoner feigning or counterfeiting insanity? What kind of a man is he? A youth of twenty-three, without learning, education or experience. Dr. Spencer raises him just above the brute; Dr. Bigelow exalts him no higher; and Dr. Dimon thinks that he has intellectual capacity not exceeding that of a child of ten years, with the knowledge of one of two or three. These are the People's witnesses. All the witnesses concur in these estimates of his mind.

Can you conceive of such a creature comprehending such a plot, and standing up in his cell in the jail, hour after hour, day after day, week after week, and month after month, carrying on such a fraud; and all the while pouring freely into the ears of inquisitors curious, inquisitors friendly, and inquisitors hostile, without discrimination or alarm, or apparent hesitation or suspicion, with "child-like simplicity," as our witnesses describe it, and with "entire docility," as it is described by the witnesses for the People, confessions of crime which, if they fail to be received as evidences of insanity, must constitute an insurmountable barrier to his acquittal?

I am ashamed for men who, without evidence of the prisoner's dissimulation, and in opposition to the unanimous testimony of all the witnesses, that he is sincere, still think that this poor fool may deceive

them. If he could feign, and were feigning, would he not want some counsel, some friend, if not to advise and assist, at least to inform him of the probable success of the fraud? And yet not one of his counsel or witnesses has ever conversed with him, but in a crowd of adverse witnesses; and for myself, I have not spoken with him in almost two months, and during the same period, have never looked upon him elsewhere than here, in the presence of the court and the multitude. Would a sane man hold nothing back? admit everything? to everybody? affect no ignorance? no forgetfulness? no bewilderment? no confusion? no excitement? no delirium?

Dr. Ray, in his *Treatise on the Medical Jurisprudence of Insanity*, p. 333, gives us very different ideas from all this, of those who can feign, and of the manner of counterfeiting:

A person who has not made the insane a subject of study, cannot simulate madness, so as to deceive a physician well acquainted with the disease. Mr. Haslam declares, that "to sustain the character of a paroxysm of active insanity, would require a continuity of exertion beyond the power of a sane person." Dr. Conolly affirms, that he can hardly imagine a case which would be proof against an efficient system of observation. The grand fault committed by impostors is that they *overdo* the character they assume. The really mad, except in the acute stage of the disease, are, generally speaking, not readily recognized as such by a stranger, and they retain so much of the rational as to require an effort to detect the impairment of their faculties.

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Generally speaking, after the acute stage has passed off, a maniac has no difficulty in remembering his friends and acquaintances, the places he has been accustomed to frequent, names, dates, events, and the occurrences of his life. The ordinary relations of things are, with some exceptions, as easily and clearly perceived as ever, and his discrimination of character seems to be marked by his usual shrewdness. . . . A person simulating mania will frequently deny all knowledge of men and things with whom he has always been familiar.

And now, gentlemen, I will give you a proof of the difference between this real science and the empiricism upon which the counsel for the People rely in this cause. Jean Pierre was brought before the Court of Assizes in Paris, in 1824, accused of forgery, swindling and incendiarism. He feigned insanity. A commission of eminent physicians examined him, and detected his imposture by his pretended forgetfulness, and confusion in answering interrogatories concerning his life and history. The most prominent of these questions are set down in the books. (Ray, p. 338.) I submitted these questions and answers, with a statement of Jean Pierre's case, to Dr. Spencer, and he, governed by the rules which have controlled him in the present cause, pronounced the impostor's answers to be the evidence of insanity, because they showed a decay of memory.

Again, gentlemen, look at the various catechisms in which this prisoner has been exercised for two months, as a test of his sanity. Would any sane man

have propounded a solitary one of all those questions to any person whom he believed to be of sound mind? Take an instance. On one occasion, Dr. Willard, a witness for the People, having exhausted the idiot's store of knowledge and emotion, expressed a wish to discover whether the passion of fear had burned out, and employing Mr. Morgan's voice addressed the prisoner thus: "Bill, they're going to take you out to kill you. They're going to take you out to kill you, Bill." The poor creature answered nothing. "What do you think of it, Bill?" Answer: "I don't think about it—I don't believe it." "Bill," continues the inquisitor with louder and more terrific vociferation, "they're going to kill you, and the doctors want your bones; what do you think of it, Bill?" The prisoner answers: "I don't think about it—I don't believe it." The doctor's case was almost complete, but he thought that perhaps the prisoner's stupidity might arise from inability to understand the question. Therefore, lifting his voice still higher, he continues: "Did you ever see the doctors have any bones? Did you ever see the doctors have any bones, Bill?" The fool answers, "I have." "Then, where did you see them, Bill?" "In Dr. Pitney's office." And thus, by this dialogue, the sanity of the accused is, in the judgment of Dr. Willard, completely established. It is no matter that if the prisoner had believed the threat, his *belief* would have proved him sane; if he had been terrified, his *fears* would have sent him to the gallows; if he had forgotten the fleshless skeleton

he had seen, he would have been convicted of *falsehood*, and of course have been sane. Of such staple as this are all the questions which have been put to the prisoner by all the witnesses. There is not an interrogatory which any one of you would have put to a child twelve years old.

Does the prisoner feign insanity? One hundred and eight witnesses have been examined, of whom seventy-two appeared on behalf of the People. No one of them has expressed a belief that he was simulating. On the contrary, every witness to whom the inquiry had been addressed, answers that the sincerity of the prisoner is beyond question. . . .

I submit to you, gentlemen of the jury, that by comparing the prisoner with himself, as he was in his earlier, and as he is in his later history, I have proved to you conclusively that he is visibly changed and altered in mind, manner, conversation and action, and that all his faculties have become disturbed, impaired, degraded and debased. I submit, also, that it is proved: *First*, that this change occurred between the sixteenth and the eighteenth years of his life, in the State prison, and that, therefore, the change thus palpable was not, as the Attorney General contends, effected by mere lapse of time and increase of years, nor by the natural development of latent dispositions; *Secondly*, that inasmuch as the convicts in the State prison are absolutely abstemious from intoxicating drinks, the change was not, as the Attorney General supposes, produced by intemperance.

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I have thus arrived at the *third* proposition in this case, which is, that the prisoner at the bar is insane. This I shall demonstrate: *First*, by the fact already so fully established, that the prisoner is changed; *Secondly*, by referring to the predisposing causes which might be expected to produce insanity; *Thirdly*, by the incoherent and extravagance of the prisoner's conduct and conversation, and the delusions under which he has labored.

And now as to the predisposing causes. The prisoner was born in this village, twenty-three years ago, of parents recently emerged from slavery. His mother was a woman of violent passions, severe discipline, and addicted to intemperance. His father died of *delirium tremens*, leaving his children to the neglect of the world, from which he had learned nothing but its vices. *Hereditary insanity* was added to the prisoner's misfortunes, already sufficiently complicated. His aunt, Jane Brown, died a lunatic. His uncle, Sidney Freeman, is an acknowledged lunatic.

All writers agree, what it needs not writers to teach, that *neglect of education* is a fruitful cause of crime. If neglect of education produces crime, it equally produces insanity. Here was a bright, cheerful, happy child, destined to become a member of the social state, entitled by the principles of our government to equal advantages for perfecting himself in intelligence, and even in political rights, with each of the three millions of our citizens, and blessed by our religion with equal hopes. Without his being taught to read, his mother,

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who lives by menial service, sends him forth at the age of eight or nine years to like employment.

Reproaches are cast on his mother, on Mr. Warden, and on Mr. Lynch, for not sending him to school, but these reproaches are all unjust. How could she, poor degraded negress and Indian as she was, send her child to school? And where was the school to which Warden and Lynch should have sent him? There was no school for him. His few and wretched years date back to the beginning of my acquaintance here, and during all that time, with unimportant exceptions, there has been no school here for children of his caste. A school for colored children was never established here, and all the common schools were closed against them. Money would always procure instruction for my children, and relieve me from the responsibility. But the colored children, who have from time to time been confided to my charge, have been cast upon my own care for education. When I sent them to school with my own children, they were sent back to me with a message that they must be withdrawn, because they were black, or the school would cease. Here are the fruits of this unmanly and criminal prejudice. A whole family cut off in the midst of usefulness and honors by the hand of an assassin. You may avenge the crime, but whether the prisoner be insane or criminal, there is a tribunal where this neglect will plead powerfully in his excuse, and trumpet-tongued against the "deep damnation of his taking-off."

Again. The prisoner was subjected, in tender years, to severe and undeserved *oppression*. Whipped at Lynch's; severely and unlawfully beaten by Wellington, for the venial offense of forgetting to return a borrowed umbrella; hunted by the police on charges of petty offenses, of which he was proved innocent; finally convicted, upon constructive and probably perjured evidence, of a crime of which it is now universally admitted he was guiltless, he was plunged into the State prison at the age of sixteen, instead of being committed to a House of Refuge.

Mere *imprisonment* is often a cause of insanity. Four insane persons have, on this trial, been mentioned as residing among us, all of whom became insane in the State prison. Authentic statistics show that there are never less than thirty insane persons in each of our two great penitentiaries. In the State prison the prisoner was subjected to severe corporeal punishment, by keepers who mistook a decay of mind and morbid melancholy for idleness, obstinacy and malice. Beaten, as he was, until the organs of his hearing ceased to perform their functions, who shall say that other and more important organs connected with the action of his mind, did not become diseased through sympathy?

Such a life, so filled with neglect, injustice and severity, with anxiety, pain, disappointment, solicitude and grief, would have its fitting conclusion in a madhouse. If it be true, as the wisest of inspired writers hath said, "Verily oppression maketh a wise

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man 'mad,' what may we not expect it to do with a foolish, ignorant, illiterate man! Thus it is explained why, when he came out of prison, he was so dull, stupid, morose; excited to anger by petty troubles, small in our view, but mountains in his way; filled in his waking hours with moody recollections, and rising at midnight to sing incoherent songs, dance without music, read unintelligible jargon, and combat with imaginary enemies.

How otherwise than on the score of madness can you explain the stupidity which caused him to be taken for a fool at Applegate's, on his way from the prison to his home? How else, the ignorance which made him incapable of distinguishing the coin which he offered at the hatter's shop? How else, his ludicrous apprehensions of being re-committed to the State prison for five years, for the offense of breaking his dinner knife? How else, his odd and strange manner of accounting for his deafness, by expressions, all absurd and senseless, and varying with each interrogator?

It is now perfectly certain, from the testimony of Mr. Van Arsdale and Helen Holmes, that the prisoner first stabbed Mrs. Van Nest, in the back yard, and then entered the house and stabbed Mr. Van Nest, who fell lifeless at the instant of the blow. And yet, sincerely trying to give an account of the dreadful scenes, exactly as they passed, the prisoner has invariably stated, in his answers to every witness, that he entered the house, stabbed Van Nest, went into

the yard, and then, and not before, killed Mrs. Van Nest. It was in this order that he related the transaction to Warren T. Worden, to John M. Austin, to Ira Curtis, to Ethan A. Warden, to William P. Smith, to Dr. Van Epps, to James H. Bostwick, to Dr. Brigham, to Nathaniel Lynch, to Dr. Willard, to Dr. Bigelow, and to Dr. Spencer. How else than on the score of madness can you explain this confusion of memory? and if the prisoner was sane, and telling a falsehood, what was the motive?

How else than on the score of a demented mind will you explain the fact, that he is without human curiosity; that he has never, since he came out of prison, learned a fact, or asked a question? He has been visited by hundreds in his cell, by faces become familiar, and by strangers, by fellow prisoners, by jailers, by sheriff, by counsel, by physician, by friends, by enemies, and by relations, and they unanimously bear witness that he has never asked a question. The oyster, shut up within its limestone walls, is as inquisitive as he.

How else will you explain the mystery that he, who seven years ago had the capacity to relate connectively any narrative, however extended, and however complex in details, is now unable to continue any relations of the most recent events, without the prompting of perpetual interrogatories, always leading him by known landmarks; and that when under such discipline he answers—he employs generally the easiest forms—"Yes," "No," "Don't know"?

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Then mark the confusion of his memory, manifested by contradictory replies to the same question. Warren T. Worden asked him: "Did you go in at the front door?" "Yes." "Did you go in at the back door?" "Yes." "Were you in the hall when your hand was cut?" "Yes." "Was your hand cut at the gate?" "Yes." "Did you stab Mrs. Wyckoff in the hall?" "Yes." "Did you stab Mrs. Wyckoff at the gate?" "Yes." "Did you go out at the back door?" "Yes." "Did you go out at the front door?" "Yes."

Ethan A. Warden asked him: "What made you kill the child?" "Don't know anything about that." At another time he answered: "I don't think about it; I didn't know it was a child." And again, on another occasion: "Thought—feel it more"; and to Dr. Bigelow, and other witnesses, who put the question, whether he was not sorry he killed the child, he replied: "It did look *hard*—I rather it was bigger." When the ignorance, simplicity and sincerity of the prisoner are admitted, how otherwise than on the ground of insanity can you explain such inconsistencies as these?

The testimony of Van Arsdale and Helen Holmes proves that no words could have passed between the prisoner and Van Nest, except these: "What do you want here in the house?" spoken by Van Nest before the fatal blow was struck. Yet, when inquired of by Warren T. Worden what Van Nest said to him when he entered the house, the prisoner said, after being pressed for an answer, that Van Nest said to him:

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"If you eat my liver, I'll eat yours"; and he at various times repeated to the witness the same absurd expression. To the Rev. John M. Austin he made the same statement, that Van Nest said: "If you eat my liver, I'll eat your liver"; to Ira Curtis, the same; to Ethan A. Warden, the same; to Lansing Briggs, the same; and the same to almost every other witness. An expression so absurd under the circumstances, could never have been made by the victim. How otherwise can it be explained than as the vagary of a mind shattered and crazed?

The prosecution, confounded with such evidence, appealed to Dr. Spencer for relief. He, in the plenitude of his learning, says that he had read of an ancient and barbarous people, who used to feast upon the livers of their enemies; that the prisoner has not imagination enough to have invented such an idea, and that he must somewhere have heard the tradition. But when did this demented wretch, who reads "woman" for "admirable," and "cook" for "Thompson," read Livy or Tytler, and in what classical circle has he learned the customs of the ancients? Or, what perhaps is more pertinent, who were that ancient and barbarous people, and who was their historian?

Consider now the prisoner's earnest and well-attested sincerity in believing that he could read, when either he never had acquired, or else had lost, the power of reading. The Rev. Mr. Austin visited him in jail, at an early day, asked him whether he could read, and being answered that he could, gave

him a Testament. In frequent visits afterwards, when the prisoner was asked whether he had read his testament, he answered, "Yes," and it was not until after the lapse of two months that it was discovered that he was unable to spell a monosyllable. . . .

I have shown you, gentlemen, the difficulties which attended you in this investigation, the law concerning insanity, the nature and characteristics of that disease, the great change which the prisoner has undergone, and some of those marked extravagances which denote lunacy. More conclusive evidence yet remains; and *first*, the delusion by which the prisoner was overpowered, and under whose fearful spell his crimes were committed.

Delusion does not always attend insanity, but when found it is the most unequivocal of all proofs. I have already observed, that melancholy is the first stage of madness, and long furnished the name for insanity. In the case of Hatfield, who fired at the king in Drury-Lane Theatre, Lord Erskine, his counsel, demonstrated that insanity did not consist in the absence of any of the intellectual faculties, but in delusion; and that an offender was irresponsible, if his criminal acts were the immediate, unqualified offspring of such delusion. Erskine there defined a *delusion* to consist in deductions from the *immovable* assumption of the matters *as realities*, either without any foundation whatever, or so distorted and disfigured by fancy as to be nearly the same thing as their creation.

The learned men here have given us many illustra-

tions of such delusions; as that of the man who believes that his legs are of glass, and therefore refuses to move, for fear they will break; of the man who fancies himself the king of the French; or of him who confides to you the precious secret that he is emperor of the world. These are palpable delusions, but there are others equally, or even more fatal in their effects, which have their foundation in some original fact, and are thus described by Dr. Ray, at page 210 of his work:

In another class of cases, the exciting cause of homicidal insanity is of a moral nature, operating upon some peculiar physical predisposition, and sometimes followed by more or less physical disturbance. Instead of being urged by a sudden imperious impulse to kill, the subjects of this form of the affection, after suffering for a certain period much gloom of mind and depression of spirits, feel as if bound by a sense of necessity to destroy life, and proceed to the fulfillment of their destiny with the utmost calmness and deliberation. So reluctant have courts and juries usually been to receive the plea of insanity in defense of crime, deliberately planned and executed by a mind in which no derangement of intellect has ever been perceived, that it is of the greatest importance that the nature of these cases should not be misunderstood.

Our learned witnesses have given us various definitions of a delusion. Dr. Hun's is perhaps as clear and accurate as any: "It is a cherished opinion opposed by the sense and judgment of all mankind." In simple speech, it is what is called the predominance of one

idea, by which reason is subverted. I shall now show you such a predominance of one idea, as will elucidate the progress of this maniac from the first disturbance of his mind, to the dreadful catastrophe on the shores of the Owasco Lake. That delusion is a star to guide your judgment to an infallible conclusion, that the prisoner is insane. If you mistake its course and consign him to a scaffold, it will rest over his grave, indicating him as a martyr, and you as erring or unjust judges.

In April, 1840, Mrs. Godfrey, who resides in the town of Sennett, on the middle road, four miles north-east of Auburn, lost a horse. One Jack Furman, a hardened offender, stole the horse. For some purpose not now known, he put him in the care of the prisoner, who was seen with him. Both Furman and Freeman were arrested. The former was the real thief and Freeman constructively guilty. Freeman was arrested by Vanderheyden, taken into an upper chamber, and *there declared his innocence of the crime*. He was nevertheless committed to jail. *All* the police, and the most prejudiced of the witnesses for the People, have testified their entire conviction that the prisoner was innocent. Furman was selected by favor as a witness for the People. Freeman, while in jail, comprehending his danger, and conscious of his innocence, dwelt upon the injustice, until, having no other hope, he broke prison and escaped. Being retaken, he assigned as the reason for his flight, that Jack Furman stole the horse, and was going to swear him into the State prison.

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The result was as he apprehended. He was convicted by the perjury of Furman, and sentenced to the State prison for five years. This was the *first* act in the awful tragedy of which he is the hero. Let judges and jurors take warning from its fatal consequences. How deeply this injustice sank into his mind, may be seen from the testimony of Aretas A. Sabin, the keeper, who said to him on the day he entered the prison, "I am sorry to see you come here so young." The prisoner wept. Well would it have been if this, the last occasion on which the prisoner yielded to that infirmity, had, ominous as it was of such fatal mischief, been understood and heeded. A year passed away, and he is found in the prison, neglecting his allotted labor, sullen and morose. . . .

The evidence of Freeman's actions since he left prison down to the very night of his deeds of assassination prove that he felt a sense of the wrongs that had been done him, that this idea took possession of him, and overthrew whatever of conscience, mind or reason remained.

It would be tedious to gather all the evidence of similar import. Let it suffice, that the witnesses who have conversed with the prisoner, as well those for the People as those for him, concur fully in the same statement of facts, as to his reasons and motives for the murders. We have thus not merely established the existence of an insane delusion, but have traced directly to that overpowering delusion, the crimes which the prisoner has committed.

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How powerful that delusion must have been, may be inferred from the fact that the prisoner, when disabled, desisted from his work and made his retreat to his friends in Oswego County, not to escape from punishment for the murders, but, as he told Mr. E. A. Warden, to wait till his wounded hand should be restored, that he might resume his dreadful butchery; and, as he told Dr. Bigelow, because he couldn't "handle his hand." The intenseness of this delusion exceeds that under which Hatfield assailed the king; that which compelled Henriette Cornier to dissever the head of the child entrusted to her care; and that of Rabello, the Portuguese, who cut to pieces with his axe, the child who trod upon his feet.

The next feature in the cause which will claim your attention, gentlemen of the jury, is the *manner and circumstances of the act itself*.

In Ray's Medical Jurisprudence, at page 224, are given several tests by which to distinguish between the homicidal maniac and the murderer. We shall best consider the present case by comparing it with those tests:

I. There is the *irresistible, motiveless* impulse to destroy life. Never was homicide more *motiveless*, or the impulse more completely irresistible, than in the present case, as we have learned from the testimony already cited.

II. In nearly all cases the criminal act has been preceded, either by some well-marked disturbance of the health, or by an irritable, gloomy, dejected, or melancholy state; in short, by many of the symptoms of the incubation of mania.

Classics of the Bar

How truly does this language describe the condition of the prisoner during the brief period of his enlargement!

III. The impulse to destroy is powerfully excited by the sight of murderous weapons—by favorable opportunities of accomplishing the act—by contradiction, disgust, or some other equally trivial and even imaginary circumstance.

While we learn from Hersey's testimony, that the prisoner kept a store of knives fit for such a deed, we find in the denial of his demands for settlement, for pay, and for process, by Mrs. Godfrey and the magistrates, the contradiction and causes of disgust here described.

IV. The victims of the homicidal monomaniac are either entirely unknown or indifferent to him, or they are amongst his most loved and cherished objects.

Freeman passed by his supposed oppressors and persecutors, and fell upon a family absolutely indifferent, and almost unknown to him, while he reserved the final stroke for his nearest and best friend, and brother-in-law.

V. The monomaniac sometimes diligently conceals and sometimes avows his purpose, and forms schemes for putting it into execution, testifying no sentiment of grief.

The prisoner concealed his purpose from all but Hersey. He purchased the knife which he used, in open day, at a blacksmith's shop, in the presence of

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persons to whom he was well known, and ground it to its double edge before unsuspecting witnesses, as coolly and deliberately as if it were to be employed in the shambles. He applied at another blacksmith's shop, where he was equally well known, to have another instrument made. He shaped the pattern in a carpenter's shop, carried it to the smith, disagreed about the price, and left the pattern upon the forge in open sight, never thinking to reclaim it, and it lay there until it was taken by the smith before the coroner's inquest, as an evidence of his design. So strange was his conduct, and so mysterious the form of the knife which he required, that Morris, the smith, suspected him, and told him that he was going to "kill somebody"; to which he answered with the non-chalance of the butcher: "that's nothing to you if you get your pay for the knife." On the two days immediately preceding the murder, he is found sharpening and adjusting his knives at a turner's shop, next door to his own dwelling, in the presence of persons to whom he is well known, manifesting no apprehension, and affecting no concealment.

The trivial concerns of his finance and occupation are as carefully attended to, as if the murder he was contemplating had been an ordinary and lawful transaction. Hyatt demands three shillings for the knife. The prisoner cheapens until the price is reduced to eighteen pence, with the further advantage that it should be sharpened and fitted to a handle. Hyatt demands six pence for putting a rivet into his

knife. He compromises, and agrees to divide the labor and pay half the price. He deliberately takes out his wallet and lays down three cents to Simpson, the turner, for the use of the grindstone. On the very day of the murder, he begs some grease at the soap factory to soften his shoes, and tells Aaron Demun that he is going into the country to live in peace. At four o'clock in the afternoon he buys soap at the merchant's for Mary Ann Newark, the poor woman at whose house he lived. He then goes cautiously to his room, takes the knives from the place of their concealment under his bed, throws them out of the window, to avoid exposure to her observation, and when the night has come, and the bells are ringing for church, and all is ready, he stops to ask the woman whether there is any *chore* to be done. She tells him, none, but to fill the tub with snow. He does it as carefully as if there were no commotion in his mind, and then sallies forth, takes up his instruments, and proceeds on his errand of death. He reconnoiters the house on the north of Van Nest's, Van Nest's house, and Brooks's house on the south, and finally decides upon the middle one as the place of assault. It does not affect his purpose that he meets Mr. Cox and Mr. Patten under a broad, bright moonlight. He waits his opportunity, until Williamson, the visitor, has departed, and Van Arsdale, the laboring man, has retired to rest.

With an energy and boldness that no sane man with such a purpose could possess, he mortally stabs four persons, and dangerously wounds a fifth, in the in-

credibly short space of five minutes. Disabled, and therefore desisting from further destruction, he enters the stable, takes the first horse he finds, mounts him without a saddle, and guiding him by a halter, dashes towards the town. He overtakes and passes Williamson, the visitor, within the distance of three-fourths of a mile from the house which he had left in supposed security. Pressing on, the jaded beast, worn out with age, stumbles and brings him to the ground. He plunges his knife into the breast of the horse, abandons him, scours forward through the town, across the bridge and on the middle road to Burrington's; there seizes another horse, mounts him, and urges forward until he arrives among his relations, the De Puys, at Schroepel, thirty miles distant. They, suspecting him to have stolen the horse, refuse to entertain him. He proceeds to the adjoining village, rests from his flight, offers the horse for sale, and when his title to the horse is questioned announces his true name and residence, and refers to the De Puys, who had just cast him off, for proof of his good character and conduct. When arrested and charged with the murder he denies the act.

VI. While most maniacs having gratified their propensity to kill, voluntarily confess the act and quietly give themselves up to the proper authorities, a very few only, and those to an intelligent observer show the strongest indications of insanity, fly and persist in denying the act.

VII. Murder is never criminally committed without some *motive* adequate to the purpose in the mind that is

actuated by it, while the insane man commits the crime without any motive whatever, strictly deserving the name.

VIII. The *criminal* never sheds more blood than is necessary for the attainment for his object. The *monomaniac* often sacrifices all within his reach, to the cravings of his murderous propensity.

IX. The *criminal* either denies or confesses his guilt; if the latter, he sues for mercy, or glories in his crimes. On the contrary, the *maniac*, after gratifying his bloody desires, testifies neither remorse, repentance, nor satisfaction.

X. The *criminal* has accomplices; the *maniac* has none.

XI. The *murderer* never conceives a design to murder without projecting a plan for concealing his victim, effecting his escape, and baffling pursuit. The *maniac* prepares the means of committing the crime, with calmness and deliberation, but never dreams of the necessity of concealing it when done, or of escape, until his victim lies at his feet.

Dr. Bigelow and others state that the prisoner told them, as obviously was the case, that he sought no plunder; that he thought not of escape or flight, until his "things" were broken, and his hand was cut, so that he could not continue his "work." He seized the nearest and the most worthless horse in the stable, leaving two fleet animals in their stalls. He thought only of taking Burrington's horse when the first failed; all he cared for was to get out of the county, there to rest until his hand was cured, so that he could come back and do more "work." He rested from flight within thirty miles from the seat of his crimes, and, in

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selling his horse, was depriving himself of the only means of making his escape successful. When the person of Van Nest was examined, his watch, pocket-book, money and trinkets were found all undisturbed. Not an article in the house had been removed; and when the prisoner was searched upon his arrest, there was found in his pockets nothing but one copper coin, the hundredth part of a dollar. Without further detail, the parallel between the prisoner and the tests of madness established by medical jurisprudence, is complete.

The testimony of the defense conclusively and overwhelmingly shows that the prisoner is insane. The evidence of the State on this point is weak and unsatisfactory.

Doctor Thomas Spencer, the principal expert for the State, heralds himself as accustomed to teach, and informs us that he has visited the principal hospitals for the insane in London, Paris, and other European capitals. How unfortunate it was, that on his cross-examination, he could not give the name or location of any asylum in either of those cities! Even the names and locations of the "Charenton" and "Bicetre" had escaped his memory. But it is no matter. The doctor overwhelms us with learning, universal and incomprehensible. Here is his map of the mental faculties, in which twenty-eight separate powers of mind are described in odd and even numbers.

The arrows show the course of ideas through the mind. They begin with the motives in the region of the highest odd numbers in the southwest corner of

the mind, marked A, and go perpendicularly northward, through Thirst and Hunger to Sensation, marked B; then turn to the right, and go eastward, through Conception, to Attention, marked C, and then descend southward, through Perception, Memory, Understanding, Comparison, Combination, Reason, Invention and Judgment; wheel to the left under the Will, marked D, and pass through Conscience, and then to V, the unascertained center of Sensation, Volition, and Will. This is the natural turnpike road for the ideas when we are awake and sane. But here is an open shunpike, X, Y, Z, on which Ideas, when we are asleep or insane, start off and pass by Conscience, and so avoid paying toll to that inflexible gatekeeper. Now all this is very well, but I call on the doctor to show how the fugitive Idea reached the Will at D, after going to the end of the shunpike. It appeared there was no other way but to dart back again, over the shunpike, or else go cringing, at last, through the iron gate of Conscience. Then there was another difficulty. The doctor forgot the most important point on his own map, and could not tell, from memory, where he had located "*the unascertained center.*"

The doctor pronounces the prisoner sane because he has the chief intellectual faculties, Sensation, Conception, Attention, Imagination, and Association. Now here is a delicate piece of wooden cutlery, fabricated by an inmate of the lunatic asylum at Utica, who was acquitted of murder on the ground of insanity. He who fabricated it evinced in the manu-

THREE CLASSES—THIRTY-SIX FACULTIES

I. Involuntary faculties, actions, or feelings of mind.

II. Intermediate faculties.

III. Voluntary faculties.



DR. SPENCER'S MAP

This diagram, prepared by Dr. Thomas Spencer, a State's witness, was introduced in evidence by the prosecution and commented upon by Mr. Seward.

facture, Conception, Perception, Memory, Comparison, Attention, Adaptation, Co-ordination, Kindness, Gratitude, Mechanical Skill, Invention, and Pride. It is well for him that Dr. Spencer did not testify on his trial.

The personal conduct of the prisoner and the preponderance of the medical testimony in this case demonstrate beyond question the truthfulness of our defense.

There is proof, gentlemen, stronger than all this. It is silent, yet speaking. It is that *idiotic smile* which plays continually on the face of the maniac. It took its seat there while he was in the State prison. In his solitary cell, under the pressure of his severe tasks and trials in the workshop, and during the solemnities of public worship in the chapel, it appealed, although in vain, to his task-masters and his teachers. It is a smile, never rising into laughter—without motive or cause—the smile of vacuity. His mother saw it when he came out of prison, and it broke her heart. John De Puy saw it and knew his brother was demented. Deborah De Puy observed it and knew him for a fool. David Winner read in it the ruin of his friend Sally's son. It has never forsaken him in his later trials. He laughed in the face of Parker, while on confession at Baldwinsville. He laughed involuntarily in the faces of Warden and Curtis, and Worden and Austin, and Bigelow and Smith, and Brigham and Spencer.

He laughs perpetually here. Even when Van

Arsdale showed the scarred traces of the assassin's knife, and when Helen Holmes related the dreadful story of the murder of her patrons and friends, he laughed. He laughs while I am pleading his griefs. He laughs when the Attorney General's bolts would seem to rive his heart. He will laugh when you declare him guilty. When the judge shall proceed to the last fatal ceremony, and demand what he has to say why the sentence of the law should not be pronounced upon him, although there should not be an unmoistened eye in this vast assembly, and the stern voice addressing him should tremble with emotion, he will even then look up in the face of the court and laugh, from the irresistible emotions of a shattered mind, delighted and lost in the confused memory of absurd and ridiculous associations.

Follow him to the scaffold. The executioner cannot disturb the calmness of the idiot. He will laugh in the agony of death. Do you not know the significance of this strange and unnatural risibility? It is a proof that God does not forsake even the poor wretch whom we pity or despise. There are, in every human memory, a well of joys and a fountain of sorrows. Disease opens wide the one, and seals up the other forever.

You have been told, gentlemen, that this smile is hereditary and accustomed. Do you think that ever an ancestor or parent of the prisoner, or even the poor idiot himself, was in such straits as these? How then can you think that this smile was ever before recog-

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nized by these willing witnesses? That chaotic smile is the external derangement which signifies that the strings of the harp are disordered and broken, the superficial mark which God has set upon the tabernacle, to signify that its immortal tenant is disturbed by a divine and mysterious commandment. If you cannot see it, take heed that the obstruction of your vision be not produced by the mote in your own eye, which you are commanded to remove before you consider the beam in your brother's eye. If you are bent on rejecting the testimony of those who know, by experience and by science, the deep afflictions of the prisoner, beware how you misinterpret the handwriting of the Almighty.

I have waited until now, gentlemen, to notice some of the animadversions of the counsel for the People. They say that drunkenness will explain the conduct of the prisoner. It is true that John De Puy discovered that those who retailed poisonous liquors were furnishing the prisoner with this, the worst of foods for his madness. But the most laborious investigation has resulted in showing, by the testimony of Adam Gray, that he once saw the prisoner intoxicated, and that he, with some other persons, drank spirits in not immoderate quantity on the day when Van Nest was slain. There is no other evidence that the prisoner was ever intoxicated. John De Puy and Adam Gray testify, that, except that one time, he was always sober. David Winner proves he was sober all the time the witness lived at Willard's;

and Mary Ann Newark says he was entirely sober when he sallied forth on his fatal enterprise. The only value of the fact of his drunkenness, if it existed, would be to account for his disturbed nights at De Puy's, at Gray's and at Willard's. It is clearly proved that his mind was not beclouded, nor his frame excited, by any such cause on any of those occasions; and Doctor Brigham truly tells you, that while the maniac goes quietly to his bed, and is driven from it by the dreams of a disturbed imagination, the drunkard completes his revels and his orgies before he sinks to rest, and then lies stupid and besotted until nature restores his wasted energies with return of day. . . .

The testimony of Sally Freeman, the mother of the prisoner, is questioned. She utters the voice of NATURE. She is the guardian whom God assigned to study, to watch, to learn, to know what the prisoner was, and is, and to cherish the memory of it forever. She could not forget it if she would. There is not a blemish on the person of any one of us, born with us or coming from disease or accident, nor have we committed a right or wrong action, that has not been treasured up in the memory of a mother.

Juror! roll up the sleeve from your manly arm, and you will find a scar there of which you know nothing. Your mother will give you the detail of every day's progress of the preventive disease.

Sally Freeman has the mingled blood of the African and Indian races. She is, nevertheless, a woman and a mother, and Nature bears witness in every

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climate and every country, to the singleness and uniformity of those characters. I have known and proved them in the hovel of the slave, and in the wigwam of the Chippewa. But Sally Freeman has been intemperate. The white man enslaved her ancestors of the one race, exiled and destroyed those of the other, and debased them all by corrupting their natural and healthful appetites. She comes honestly by her only vice. Yet when she comes here to testify for a life that is dearer to her than her own, to say she knows her own son, the white man says she is a drunkard!

May Heaven forgive the white man for adding this last, this cruel injury to the wrongs of such a mother! Fortunately, gentlemen, her character and conduct are before you. No woman has ever appeared with more decency, modesty and propriety than she has exhibited here. No witness has dared to say or think that Sally Freeman is not a woman of truth. Dr. Clary, a witness for the prosecution, who knows her well, says, that with all her infirmities of temper and of habit, Sally "was always a truthful woman." The Roman Cornelia could not have claimed more. Let then the stricken mother testify for her own son.

I ask not, I care not—if guilt's in that heart,
I know that I love thee, whatever thou art.

The learned gentlemen who conduct this prosecution have attempted to show that the prisoner attended the trial of Henry Wyatt, whom I defended

against an indictment for murder, in this court, in February last; that he listened to me on that occasion, in regard to the impunity of crime, and that he went out a ripe and complete scholar. So far as these reflections affect me alone, they are unworthy of an answer. I pleaded for Wyatt then, as it was my right and my duty to do. Let the counsel for the People prove the words I spoke, before they charge me with Freeman's crimes. I am not unwilling those words should be recalled. I am not unwilling that any words I ever spoke in any responsible relation should be remembered.

Since they will not recall those words, I will do so for them. They were words like those I speak now, demanding cautious and impartial justice; words appealing to the reason, to the consciences, to the humanity of my fellow men; words calculated to make mankind know and love each other better, and adopt the benign principles of Christianity, instead of the long-cherished maxims of retaliation and revenge.

The creed of Mahomet was promulgated at a time when paper was of inestimable value, and the Koran teaches that every scrap of paper which the believer has saved during his life, will gather itself under his feet, to protect them from the burning iron which he must pass over while entering into Paradise. Regardless as I have been of the unkind construction of my words and actions by my contemporaries, I can say in all humility of spirit, that they are freely left to the ultimate, impartial consideration of mankind.

But, gentlemen, how gross is the credulity implied by this charge! This stupid idiot, who cannot take into his ears—deaf as death—the words which I am speaking to you, though I stand within three feet of him, and who even now is exchanging smiles with his and my accusers, regardless of the deep anxiety depicted in your countenances, was standing at yonder post, sixty feet distant from me, when he was here, if he was here at all, on the trial of Henry Wyatt. The voice of the District Attorney reverberates through this dome, while mine is lost almost within the circle of the bar. It does not appear that it was not that voice that beguiled the maniac, instead of mine; and certain it is, that since the prisoner does not comprehend the object of his attendance here now, he could not have understood anything that occurred on the trial of Wyatt.

Gentlemen, my responsibilities in this cause are discharged. In the earnestness and seriousness with which I have pleaded, you will find the reason for the firmness with which I have resisted the popular passions around me. I am, in some degree, responsible, like every other citizen, for the conduct of the community in which I live. They may not inflict on a maniac the punishment of a malefactor, without involving me in the blame, if I do not remonstrate. I cannot afford to be in error abroad, and in future times. If I were capable of a sentiment so cruel and so base, I ought to hope for the conviction of the accused; for then the vindictive passions, now so

highly excited, would subside, the consciences of the wise and the humane would be awakened, and in a few months the invectives, which have so long pursued me, would be hurled against the jury and the court.

You have now the fate of this lunatic in your hands. To him as to me, so far as we can judge, it is comparatively indifferent what be the issue. The wisest of modern men has left us a saying, that "the hour of death is more fortunate than the hour of birth," a saying which he signalized by bestowing a gratuity twice as great upon the place where he died as upon the hamlet where he was born. For ought that we can judge, the prisoner is unconscious of danger and would be insensible to suffering, let it come when it might. A verdict can only hasten, by a few months or years, the time when his bruised, diseased, wandering and benighted spirit shall return to Him who sent it forth on its sad and dreary pilgrimage.

The circumstances under which this trial closes are peculiar. I have seen capital cases where the parents, brothers, sisters, friends of the accused surrounded him, eagerly hanging upon the lips of his advocate, and watching in the countenances of the court and jury, every smile and frown which might seem to indicate his fate. But there is no such scene here. The prisoner, though in the greenness of youth, is withered, decayed, senseless, almost lifeless. He has no father here. The descendant of slaves, that father died a victim to the vices of a superior race. There is no

mother here, for her child is stained and polluted with the blood of mothers and a sleeping infant; and "he looks and laughs so that she cannot bear to look upon him." There is no brother, or sister, or friend here. Popular rage against the accused has driven them hence, and scattered his kindred and people.

On the other side I notice the aged and venerable parents of Van Nest, and his surviving children, and all around are mourning and sympathizing friends. I know not at whose instance they have come. I dare not say they ought not to be here. But I must say to you that we live in a Christian and not in a savage State, and that the affliction which has fallen upon these mourners and us, was sent to teach them and us mercy and not retaliation; that although we may send this maniac to the scaffold, it will not recall to life the manly form of Van Nest, nor reanimate the exhausted frame of that aged matron, nor restore to life, and grace, and beauty, the murdered mother, nor call back the infant boy from the arms of his Savior. Such a verdict can do no good to the living, and carry no joy to the dead. If your judgment shall be swayed at all by sympathies so wrong, although so natural, you will find the saddest hour of your life to be that in which you will look down upon the grave of your victim, and "mourn with compunctious sorrow" that you should have done so great injustice to the "poor handful of earth that will lie mouldering before you."

I have been long and tedious. I remember that it is the harvest moon, and that every hour is precious

while you are detained from your yellow fields. But if you shall have bestowed patient attention throughout this deeply interesting investigation, and shall in the end have discharged your duties in the fear of God and in the love of truth, justly and independently, you will have laid up a store of blessed recollections for all your future days, imperishable and inexhaustible.

Freeman was found guilty and sentenced to die.

An appeal was taken, the conviction was set aside and a new trial granted.

The defendant died in jail soon after.

A post-mortem examination indicated a disease of the brain.

Mr. Seward had remained steadfastly true to his conception of right and justice. At the preliminary hearing when the issue as to the sanity of the defendant was first tried he had said:

"In due time, gentlemen of the jury, when I shall have paid the debt of nature, my remains will rest here in your midst, with those of my kindred and neighbors. It is very possible they may be unhonored, neglected, spurned! But, perhaps, years hence, when the passion and excitement which now agitate the community shall have passed away, some wandering stranger, some lone exile, some Indian, some negro, may erect over them an humble stone, and thereon this epitaph:

He Was Faithful."

The Cause of Massy *vs.* Headfort

THE celebrated legal controversy between Rev. Chas. Massy and the Marquis of Headfort came on for trial at Ennis, Ireland, in July, 1804.

Briefly stated, the facts were these:

Rev. Chas. Massy in 1796 was married to a Miss Rosslewin, eighteen years of age, and of most decided beauty. The marriage was in violation of the wishes of Rev. Massy's father, and with a resultant sacrifice to the son of £16,000 a year.

In the latter part of 1803 Lord Headfort, an officer of the British Army, fifty years of age, was quartered with his regiment of soldiers in Limerick, about five miles from Summer Hill, the home of the Massys.

Rev. Massy extended to Lord Headfort an invitation that he visit him. The Marquis accepted the invitation and enjoyed the hospitalities of the Massy home.

Nay, more. He eloped with the Reverend's wife.

One of the results of the elopement was this action for criminal conversation, in which damages were asked in the sum of £40,000.

The defendant admitted the facts. As Mr. Curran suggested in his argument, the Marquis would make no denial that would tend to pale or minify the "splendor of his achievement."

He did contest, however, the allegation of *damages*, and this formed practically the only issue in the case.

A very large array of counsel appeared at the trial.

The arguments were made by George Bennett, Bartholomew Hoare, and John Philpot Curran for the plaintiff. Thomas Quin and George Ponsonby spoke for the defendant.

It is said that Mr. Curran, in his earlier years, had suffered a wrong of like character, and that his *heart* was enlisted in the cause of the plaintiff, which he upheld with such wondrous eloquence in that historic hour.

Speech of Mr. Curran

NEVER so clearly as in the present instance have I observed that safeguard of justice, which Providence hath placed in the nature of man. Such is the imperious dominion with which Truth and Reason wave their scepter over the human intellect, that no solicitations, however artful, no talent, however commanding, can reduce it from its allegiance. In proportion to the humility of our submission to its rule, do we rise into some faint emulation of that ineffable and presiding divinity, whose char-



JOHN PHILPOT CURRAN

Speech of Mr. Curran

acteristic attribute it is, to be coerced and bound by the inexorable laws of its own nature, so as to be all-wise and all-just from necessity, rather than election.

You have seen it in the learned advocate, who has preceded me, most peculiarly and strikingly illustrated. You have seen even his great talents, perhaps the first in any country, languishing under a cause too weak to carry him, and too heavy to be carried by him. He was forced to dismiss his natural candor and sincerity, and having no merits in his case, to substitute the dignity of his own manner, the resources of his own ingenuity, against the overwhelming difficulties with which he was surrounded.

Wretched client! unhappy advocate! what a combination do you form! But such is the condition of guilt, its commission mean and tremulous, its defense artificial and insincere, its prosecution candid and simple, its condemnation dignified and austere. Such has been the defendant's guilt, such his defense, such shall be my address, and such, I trust, your verdict.

The learned counsel has told you, that this unfortunate woman is not to be estimated at forty thousand pounds. Fatal and unquestionable is the truth of this assertion. Alas! gentlemen, she is no longer worth anything—faded, fallen, degraded, and disgraced, she is worth less than nothing! But it is for the honor, the hope, the expectation, the tenderness, and the comforts that have been blasted by the defendant, and have fled forever, that you are to remunerate the

plaintiff, by the punishment of the defendant. It is not her present value which you are to weigh, but it is her value at that time, when she sat basking in a husband's love, with the blessing of heaven on her head, and its purity in her heart: when she sat amongst her family, and administered the morality of the parental board: estimate that past value, compare it with its present deplorable diminution, and it may lead you to form some judgment of the severity of the injury, and the requisite extent of the compensation.

The learned counsel has told you, you ought to be cautious, because your verdict cannot be set aside for excess. The assertion is just; but has he treated you fairly by its application? His cause would not allow him to be fair—for, why is the rule adopted in this single action? Because this being peculiarly an injury to the most susceptible of all human feelings—it leaves the injury of the husband to be ascertained by the sensibility of the jury, and does not presume to measure the justice of their determination by the cold and chilly exercise of his own discretion.

In any other action it is easy to calculate. If a tradesman's arm is cut off, you can measure the loss which he has sustained; but the wound of feeling, and the agony of the heart cannot be judged by any standard with which I am acquainted. And you are unfairly dealt with, when you are called on to appreciate the present suffering of the husband, by the present guilt, delinquency and degradation of his wife. As well might you, if called on to give compensation to a man

Speech of Mr. Curran

for the murder of his dearest friend, find the measure of his injury, by weighing the ashes of the dead. But it is not, gentlemen of the jury, by weighing the ashes of the dead, that you would estimate the loss of the survivor.

The learned counsel has referred you to other cases, and other countries, for instances of moderate verdicts. I can refer you to some authentic instances of just ones. In the next country, £15,000 against a subaltern officer. In Travers and M'Carthy, £5,000 against a servant. In Tighe against Jones, £10,000 against a man not worth a shilling.

What then ought to be the rule, where rank, and power, and wealth, and station, have combined to render the example of his crime more dangerous—to make his guilt more odious—to make the injury to the plaintiff more grievous, because more conspicuous? I affect no levelling familiarity, when I speak of persons in the higher ranks of society—distinctions of orders are necessary, and I always feel disposed to treat them with respect—but when it is my duty to speak of the crimes by which they are degraded, I am not so fastidious as to shrink from their contact, when to touch them is essential to their dissection. In this action, the condition, the conduct, and the circumstances of the party, are justly and peculiarly the objects of your consideration.

Who are the parties?

The plaintiff, young, amiable, of family, and education. Of the generous disinterestedness of his heart

you can form an opinion even from the evidence of the defendant, that he declined an alliance, which would have added to his fortune and consideration, and which he rejected for an unportioned union with his present wife. She, too, at that time, was young, beautiful and accomplished; and felt her affection for her husband increase in proportion as she remembered the ardor of his love, and the sincerity of his sacrifice.

Look now to the defendant!—I blush to name him! I blush to name a rank which he has tarnished—and a patent that he has worse than cancelled. High in the army—high in the state—the hereditary councilor of the king—of wealth incalculable:—and to this last I advert with an indignant and contemptuous satisfaction, because, as the only instrument of his guilt and shame, it will be the means of his punishment, and the source of compensation for his guilt.

But let me call your attention, distinctly, to the questions you have to consider. The first is the fact of guilt. Is this noble lord guilty? His counsel knew too well how they would have mortified his vanity, had they given the smallest reason to doubt the splendor of his achievement. Against any such humiliating suspicion he had taken the most studious precaution by the publicity of the exploit. And here, in this court, and before you, and in the face of the country, has he the unparalleled effrontery of disdaining to resort even to a profession of innocence.

His guilt established, your next question is, the damages you should give. You have been told, that

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the amount of damages should depend on circumstances. You will consider these circumstances, whether of aggravation or mitigation.

His learned counsel contend, that the plaintiff has been the author of his own suffering, and ought to receive no compensation for the ill consequences of his own conduct. In what part of evidence do you find any foundation for that assertion? He indulged her, it seems, in dress—generous and attached, he probably indulged her in that point beyond his means; and the defendant now impudently calls on you to find an excuse for the adulterer in the fondness and liberality of the husband.

But you have been told, that the husband connived. Odious and impudent aggravation of injury, to add calumny to insult, and outrage to dishonor. From whom, but a man hackneyed in the paths of shame and vice—from whom, but from a man having no compunctions in his own breast to restrain him, could you expect such brutal disregard for the feelings of others; from whom, but from the cold-blooded veteran seducer—from what, but from the exhausted mind, the habitual community with shame—from what, but the habitual contempt of virtue and of man, could you have expected the arrogance, the barbarity, and folly of so foul, because so false an imputation? He should have reflected, and have blushed, before he suffered so vile a topic of defense to have passed his lips.

But ere you condemn him, let him have the benefit of the excuse, if the excuse be true.

You must have observed how his counsel fluttered and vibrated, between what they call connivance and injudicious confidence; and how, in affecting to distinguish, they have confounded them both together.

If the plaintiff has connived, I freely say to you, do not reward the wretch who has prostituted his wife, and surrendered his own honor; do not compensate the pander of his own shame, and the willing instrument of his own infamy. But as there is no sum so low to which that defense, if true, ought not to reduce your verdict, so neither is any so high to which such a charge ought not to inflame it, if the charge be false.

Where is the single fact in this case on which the remotest suspicion of connivance can be hung? Odiously has the defendant endeavored to make the softest and most amiable feelings of the heart the pretext of his slanderous imputations. An ancient and respectable prelate, the husband of his wife's sister, is chained down to the bed of sickness, perhaps to the bed of death; in that distressing situation, my client suffered that wife to be the bearer of consolation to the bosom of her sister; he had not the heart to refuse her, and the softness of his nature is now charged on him as a crime. He is now insolently told, that he connived at his dishonor, and that he ought to have foreseen, that the mansion of sickness and sorrow would have been made the scene of assignation and of guilt. On this charge of connivance I will not further weary you or exhaust myself; I will add nothing more, than that it is as false as it is impudent,

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that in the evidence it has not a color of support; and that by your verdict you should mark it with reprobation.

The other subject, namely, that he was indiscreet in his confidence, does, I think, call for some discussion, for I trust you see that I affect not any address to your passions, by which you may be led away from the subject—I presume merely to separate the parts of this affecting case, and to lay them item by item before you, with coldness of detail and not with any coloring or display of fiction or of fancy. Honorable to himself was his unsuspecting confidence, but fatal must we admit it to have been, when we look to the abuse committed upon it.

But where was the guilt of this indiscretion? He did admit this noble lord to pass his threshold as his guest. Now the charge which this noble lord builds on this indiscretion is, “Thou fool! thou hadst confidence in my honor, and that was a guilty indiscretion: thou simpleton! thou thoughtest that an admitted and cherished guest would have respected the laws of honor and hospitality, and thy indiscretion was guilt: thou thoughtest that he would have shrunk from the meanness and barbarity of requiting kindness with treachery, and thy indiscretion was guilt.”

Gentlemen, what horrid alternative in the treatment of wives would such reasoning recommend? Are they to be immured by worse than eastern barbarity? Are their principles to be depraved, their passions sublimated, every finer motive of action ex-

tinguished by the inevitable consequences of thus treating them like slaves? Or is a liberal and generous confidence in them to be the passport of the adulterer, and the justification of his crimes?

Honorably, but fatally for his own repose, he was neither jealous, suspicious nor cruel. He treated the defendant with the confidence of a friend, and his wife with the tenderness of a husband. He did leave to the noble Marquis the physical possibility of committing against him the greatest crime which can be perpetrated against a being of an amiable heart and refined education. In the middle of the day, at the moment of divine worship, when the miserable husband was on his knees, directing the prayers and thanksgiving of his congregation to their God, that moment did the remorseless adulterer choose to carry off the deluded victim from her husband, from her child, from her character, from her happiness, as if not content to leave his crime confined to its miserable aggravations, unless he gave it a cast and color of factitious sacrilege and impiety.

Oh! how happy had it been when he arrived at the bank of the river with the ill-fated fugitive, ere yet he had committed her to that boat, of which, like the fabled bark of Styx, the exile was eternal, how happy at that moment, so teeming with misery and with shame, if *you, my lord*, had met him, and could have accosted him in the character of that good genius which had abandoned him. How impressively might you have pleaded the cause of the father, of the child,

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of the mother, and even of the worthless defendant himself.

You would have said: "Is this the requital that you are about to make for respect and kindness, and confidence in your honor? Can you deliberately expose this young man, in the bloom of life, with all his hopes before him—can you expose him, a wretched outcast from society, to the scorn of a merciless world? Can you set him adrift upon the tempestuous ocean of his own passions, at this early season, when they are most headstrong; and can you cut him out from the moorings of those domestic obligations by whose cable he might ride at safety from their turbulence? Think of, if you can conceive it, what a powerful influence arises from the sense of home, from the sacred religion of the heart in quelling the passions, in reclaiming the wanderings, in correcting the discords of the human heart; do not cruelly take from him the protection of these attachments.

"But if you have no pity for the father, have mercy at least upon his innocent and helpless child; do not condemn him to an education scandalous or neglected; do not strike him into that most dreadful of all human conditions, the orphanage that springs not from the grave, that falls not from the hand of Providence, or from the stroke of death, but comes before its time, anticipated and inflicted by the remorseless cruelty of parental guilt."

For the poor victim herself, not yet immolated, while yet balancing upon the pivot of her destiny,

your heart could not be cold, nor your tongue be wordless.

You would have said to him: "Pause, my lord, while there is yet a moment for reflection. What are your motives, what your views, what your prospects from what you are about to do? You are a married man, the husband of the most amiable and respectable of women; you cannot look to the chance of marrying this wretched fugitive; between you and such an event there are two sepulchers to pass. What are your inducements? Is it love, think you? No, do not give that name to any attraction you can find in the faded refuse of a violated bed. Love is a noble and generous passion; it can be founded only on a pure and ardent friendship, on an exalted respect—on an implicit confidence in its object. Search your heart, examine your judgment; do you find the semblance of any one of these sentiments to bind you to her? What could degrade a mind to which nature or education had given port, or stature, or character into a friendship for her? Could you repose upon her faith? Look in her face, my lord; she is at this moment giving you the violation of the most sacred of human obligations as the pledge of her fidelity. She is giving you the most irrefragable proof, that as she is deserting her husband for you, so she would without a scruple abandon you for another. Do you anticipate any pleasure you might feel in the possible event of your becoming the parents of a common child? She is at this moment proving to you that

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she is as dead to the sense of parental as of conjugal obligation; and that she would abandon your offspring to-morrow, with the same facility with which she now deserts her own.

“Look then at her conduct, as it is, as the world must behold it, blackened by every aggravation that can make it either odious or contemptible, and unrelieved by a single circumstance of mitigation that could palliate its guilt, or retrieve it from abhorrence.

“Mean, however, and degraded as this woman must be, she will still, if you take her with you, have strong and heavy claims upon you. The force of such claims does certainly depend upon circumstances; before, therefore, you expose her fate to the dreadful risk of your caprice or ingratitude, in mercy to her, weigh well the confidence she can place in your future justice and honor: at that future time, much nearer than you think, by what topics can her cause be pleaded to a sated appetite, to a heart that repels her, to a just judgment in which she never could have been valued or respected?

“Here is not the case of an unmarried woman, with whom a pure and generous friendship may insensibly have ripened into a more serious attachment, until at last her heart became too deeply pledged to be reassumed. If so circumstanced, without any husband to betray, or child to desert, or motive to restrain, except what related solely to herself, her anxiety for your happiness made her overlook every other

consideration, and commit her history to your honor; in such a case, the strongest and the highest that man's imagination can suppose, in which you at least could see nothing but the most noble and disinterested sacrifice; in which you could find nothing but what claimed from you the most kind and exalted sentiment of tenderness, and devotion, and respect; and in which the most fastidious rigor would find so much more subject for sympathy than blame; let me ask you, could you even in that case, answer for your own justice and gratitude?

"I do not allude to the long and pitiful catalogue of paltry adventures, in which it seems your time has been employed; the coarse and vulgar succession of casual connections, joyless, loveless, and unendeared: but do you not find upon your memory some trace of an engagement of the character I have sketched? Has not your sense of what you would owe in such a case, and to such a woman, been at least once put to the test of experiment? Has it not once, at least, happened that such a woman, with all the resolution of strong faith, flung her youth, her hope, her beauty, her talent, upon your bosom, weighed you against the world, which she found but a feather in the scale, and took you as an equivalent? How did you then acquit yourself? Did you prove yourself worthy of the sacred trust reposed in you? Did your spirit so associate with hers, as to leave her no room to regret the splendid and disinterested sacrifice she had made? Did her soul find a pillow

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in the tenderness of yours, and support in its firmness? Did you preserve her high in her own consciousness, proud in your admiration and friendship, and happy in your affection?

"You might have so acted; and the man that was worthy of her would have perished rather than not so act, as to make her delighted with having confided so sacred a trust to his honor.

"Did you so act? Did she feel that, however precious to your heart, she was still more exalted and honored in your reverence and respect? Or did she find you coarse and paltry, fluttering and unpurposed, unfeeling, and ungrateful?

"You found her a fair and blushing flower, its beauty and its fragrance bathed in the dew of heaven. Did you so tenderly transplant it, as to preserve that beauty and fragrance unimpaired? Or did you so rudely cut it, as to interrupt its nutriment, to waste its sweetness, to blast its beauty, to bow its faded and sickly head? And did you at last fling it like 'a loathsome weed' away?

"If then to such a woman, so clothed with every title that could ennoble, and exalt, and endear her to the heart of man, you would be cruelly and capriciously deficient, how can a wretched fugitive like this, in every point her contrast, hope to find you just? Send her away. Send her back to her home, to her child, to her husband, to herself."

Alas! there was no one to hold such language to this noble defendant; he did not hold it to himself.

But he paraded his despicable prize in his own carriage, with his own retinue, his own servants; this veteran Paris hawked his enamored Helen from this western quarter of the island to a seaport in the eastern, crowned with the acclamations of a senseless and grinning rabble, glorying and delighted, no doubt, in the leering and scoffing admiration of grooms, and ostlers, and waiters, as he passed.

In this odious contempt of every personal feeling, of public opinion, of common humanity, did he parade this woman to the seaport, whence he transported his precious cargo to a country, where her example may be less mischievous than in her own; where I agree with my learned colleague in heartily wishing he may remain with her forever. We are too poor, too simple, too unadvanced a country, for the example of such achievements. When the relaxation of morals is the natural growth and consequence of the great progress of arts and wealth, it is accompanied by a refinement that makes it less gross than shocking; but for such palliations we are at least a century too young. I advise you, therefore, most earnestly to rebuke this budding mischief, by letting the wholesome vigor and chastisement of a liberal verdict speak what you think of its enormity.

In every point of view in which I can look at the subject, I see you are called upon to give a verdict of bold, just, indignant, and exemplary compensation. The injury of the plaintiff demands it from your justice; the delinquency of the defendant provokes it

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by its enormity. The rank on which he has relied for impunity calls upon you to tell him, that crime does not ascend to the rank of the perpetrator, but the perpetrator sinks from his rank, and descends to the level of his delinquency. The style and mode of his defense is a gross aggravation of his conduct, and a gross insult upon you.

Look upon the different subjects of his defense as you ought, and let him profit by them as he deserves. Vainly presumptuous upon his rank, he wishes to overawe you by that despicable consideration. He next resorts to a cruel aspersion upon the character of the unhappy plaintiff, whom he had already wounded beyond the possibility of reparation: he has ventured to charge him with connivance. As to that, I will only say, gentlemen of the jury, do not give this vain boaster a pretext for saying, that if her husband connived in the offense, the jury also connived in the reparation.

But he has pressed another curious topic upon you. After the plaintiff had cause to suspect his designs, and the likelihood of their being fatally successful, he did not then act precisely as he ought. Gracious God! what an argument for him to dare to advance! It is saying this to him:—"I abused your confidence, your hospitality; I laid a base plan for the seduction of the wife of your bosom; I succeeded at last, so as to throw in upon you that most dreadful of all suspicions to a man fondly attached, proud of his wife's honor, and tremblingly alive to his own. In this so pitiable

distress, which I myself had studiously and deliberately contrived for you, between hope and fear, and doubt and love, and jealousy and shame; one moment shrinking from the cruelty of your suspicion; the next, fired with indignation at the facility and credulity of your acquittal; in this labyrinth of doubt, in this frenzy of suffering, you were not collected and composed; you did not act as you might have done, if I had not worked you to madness; and upon that very madness which I have inflicted upon you, upon the very completion of my guilt, and of your misery, I will build my defense. You will not act critically right, and therefore are unworthy of compensation."

Gentlemen, can you be dead to the remorseless atrocity of such a defense? And shall not your honest verdict mark it as it deserves?

But let me go a little further; let me ask you—for I confess I have no distinct idea—what should be the conduct of a husband so placed, and who is to act critically right? Shall he lock her up, or turn her out, or enlarge or abridge her liberty of acting as she pleases? Oh, dreadful Areopagus of the tea-table! how formidable thy inquests, how tremendous thy condemnations! In the first case, he is brutal and barbarous; an odious eastern despot. In the next; what! turn an innocent woman out of his house, without evidence or proof, but merely because he is vile and mean enough to suspect the wife of his bosom, and the mother of his child! Between these extremes, what

intermediate degree is he to adopt? I put this question to you—Do you at this moment, uninfluenced by any passion as you now are, but cool and collected, and uninterested as you must be, do you see clearly this proper and exact line, which the plaintiff should have pursued? I much question if you do. But if you did or could, must you not say, that he was the last man from whom you should expect the coolness to discover, or the steadiness to pursue it?

And yet this is the outrageous and insolent defense that is put forward to you. My miserable client, when his brain was on fire, and every fiend of hell was let loose upon his heart, should then, it seems, have placed himself before his mirror; he should have taught the stream of agony to flow decorously down his forehead; he should have composed his features to harmony; he should have writhed with grace, and groaned in melody.

But look farther to this noble defendant, and his honorable defense. The wretched woman is to be successively the victim of seduction, and of slander. She, it seems, received marked attentions. Here, I confess, I felt myself not a little at a loss. The witnesses could not describe what these marked attentions were, or are. They consisted, not, if you believe the witness that swore to them, in any personal approach, or contact whatsoever, nor in any unwarrantable topics of discourse. Of what materials, then, were they composed? Why, it seems a gentleman had the insolence at table to propose to her a

glass of wine; and she, oh, most abandoned lady! instead of flying like an angry parrot at his head, and besmirching and bescratching him for his insolence, tamely and basely replies, "Port, sir, if you please."

But, gentlemen, why do I advert to this folly, this nonsense? Not surely to vindicate from censure the most innocent and the most delightful intercourse of social kindness, or harmless and cheerful courtesy.

"Where virtue is, these are most virtuous." But I am soliciting your attention, and your feeling, to the mean and odious aggravation, to the unblushing and remorseless barbarity, of falsely aspersing the wretched woman he had undone.

One good he has done: he has disclosed to you the point in which he can feel; for how imperious must that avarice be, which could resort to so vile an expedient of frugality? Yes, I will say, that, with the common feelings of a man, he would have rather suffered his thirty thousand a year to go as compensation to the plaintiff, than have saved a shilling of it by so vile an expedient of economy. He would rather have starved with her in a jail, he would rather have sunk with her into the ocean, than have so vilified her—than have so degraded himself.

But it seems, gentlemen, and indeed you have been told, that long as the course of his gallantries has been, and he has grown gray in the service, it is the first time he has been called upon for damages. To how many might it have been fortunate, if he had

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not that impunity to boast? Your verdict will, I trust, put an end to that encouragement to guilt, that is built upon impunity.

The devil, it seems, has saved the noble Marquis harmless in the past; but your verdict will tell him the term of that indemnity is expired—that his old friend and banker has no more effects in his hands—and that if he draws any more upon him, he must pay his own bills himself. You will do much good by doing so: you may not enlighten his conscience, nor touch his heart; but his frugality will understand the hint. It will adopt the prudence of age, and deter him from pursuits, in which, though he may be insensible of shame, he will not be regardless of expense. You will do more—you will not only punish him in his tender point, but you will weaken him in his strong one, his money.

We have heard much of this noble lord's wealth, and much of his exploits, but not much of his accomplishments or his wit; I know not that his verses have soared even to the "poet's corner." I have heard it said, that an ass laden with gold could find his way through the gate of the strongest city. But, gentlemen, lighten the load upon his back, and you will completely curtail the mischievous faculty of a grave animal, whose momentum lies, not in his agility, but his weight; not in the quantity of his motion, but the quantity of his matter.

There is another ground on which you are called upon to give most liberal damages, and that has been

laid by the unfeeling vanity of the defendant. This business has been marked by the most elaborate publicity. It is very clear that he has been allured by the glory of the chase, and not the value of the game. The poor object of his pursuit could be of no value to him, or he could not have so wantonly, and cruelly, and unnecessarily abused her. He might easily have kept this unhappy intercourse an unsuspected secret. Even if he wished for elopement, he might easily have so contrived it, that the place of her retreat would be profoundly undiscoverable.

Yet, though even the expense, a point so tender to his delicate sensibility, of concealing, could not be one-fortieth of the cost of publishing her, his vanity decided him in favor of glory and publicity. By that election, he has, in fact, put forward the Irish nation, and its character, so often and so variously calumniated, upon its trial before the tribunal of the empire; and your verdict will this day decide whether an Irish jury can feel with justice and spirit upon a subject that involves conjugal affection and comfort, domestic honor and repose, the certainty of issue, the weight of public opinion, the gilded and presumptuous criminality of overweening rank and station.

I doubt not but he is at this moment reclined on a silken sofa, anticipating that submissive and modest verdict, by which you will lean gently on his errors; and expecting from your patriotism, no doubt, that you will think again, and again, before you condemn any great portion of the immense revenue of a great

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absentee, to be detained in the nation that produced it, instead of being transmitted, as it ought, to be expended in the splendor of another country. He is now probably waiting for the arrival of the report of this day, which I understand a famous note-taker has been sent hither to collect. Let not the gentleman be disturbed.

Gentlemen, let me assure you, it is more, much more the trial of you, than of the noble Marquis, of which this imported recorder is at this moment collecting materials. His noble employer is now expecting a report to the following effect:—"Such a day came on to be tried at Ennis, by a special jury, the cause of Charles Massy against the most noble the Marquis of Headfort. It appeared that the plaintiff's wife was young, beautiful, and captivating; the plaintiff himself, a person fond of this beautiful creature to distraction, and both doting on their child. But the noble Marquis approached her; the plume of glory nodded on his head. Not the goddess Minerva, but the goddess Venus, had lighted up his casque with 'the fire that never tires, such as many a lady gay had been dazzled with before.' At the first advance she trembled; at the second, she struck to the redoubted son of Mars, and pupil of Venus. The jury saw it was not his fault (it was an Irish jury); they felt compassion for the tenderness of the mother's heart, and for the warmth of the lover's passion. The jury saw on the one side, a young, entertaining gallant; on the other, a beautiful creature, of charms irresistible. They recol-

lected that Jupiter had been always successful in his amours, although Vulcan had not always escaped some awkward accidents. The jury was composed of fathers, brothers, husbands, but they had not the vulgar jealousy, that views little things of that sort with rigor; and, wishing to assimilate their country in every respect to England, now that they are united to it, they, like English gentlemen, returned to their box, with a verdict of six pence damages and six pence costs."

Let this be sent to England. I promise you, your odious secret will not be kept better than that of the wretched Mrs. Massy. There is not a bawdy chronicle in London, in which the epitaph which you would have written on yourselves will not be published; and our enemies will delight in the spectacle of our precocious depravity, in seeing that we can be rotten before we are ripe. I do not suppose it; I do not, cannot, will not believe it; I will not harrow up myself with the anticipated apprehension.

There is another consideration, gentlemen, which I think most imperiously demands even a vindictive award of exemplary damages—and that is, the breach of hospitality.

To us peculiarly does it belong to avenge the violation of its altar. The hospitality of other countries is a matter of necessity or convention—in savage nations, of the first: in polished, of the latter: but the hospitality of an Irishman is not the running account of posted and ledgered courtesies, as in other countries;

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it springs like all his qualities, his faults, his virtues, directly from his heart. The heart of an Irishman is by nature bold, and he confides; it is tender, and he loves; it is generous, and he gives; it is social, and he is hospitable. This sacrilegious intruder has profaned the religion of that sacred altar so elevated in our worship, so precious to our devotion: and it is our privilege to avenge the crime. You must either pull down the altar, and abolish the worship; or you must preserve its sanctity undebased. There is no alternative between the universal exclusion of all mankind from your threshold, and the most rigorous punishment of him who is admitted and betrays. This defendant has been so trusted, has so betrayed, and you ought to make him a most signal example.

Gentlemen, I am the more disposed to feel the strongest indignation and abhorrence at this odious conduct of the defendant, when I consider the deplorable condition to which he has reduced the plaintiff, and perhaps the still more deplorable one that the plaintiff has in prospect before him. What a progress has he to travel through, before he can attain the peace and tranquillity which he has lost! How like the wounds of the body are those of the mind! how burning the fever! how painful the suppuration! how slow, how hesitating, how relapsing the process to convalescence! Through what a variety of suffering, what new scenes and changes must my unhappy client pass, ere he can re-attain, should he ever re-attain, that health of soul of which he has been de-

spoiled by the cold and deliberate machinations of this practiced and gilded seducer?

If, instead of drawing upon his incalculable wealth for a scanty retribution, you were to stop the progress of his despicable achievements, by reducing him to actual poverty, you could not even so punish him beyond the scope of his offense, nor reprise the plaintiff beyond the measure of his suffering. Let me remind you, that in this action, the law not only empowers you, but its policy commands you to consider the public example, as well as the amount of your verdict. I confess I am most anxious that you should acquit yourselves worthily upon this important occasion. I am addressing you as fathers, husbands, brothers. I am anxious that a feeling of those high relations should enter into, and give dignity to your verdict.

But I confess, I feel a tenfold solicitude when I remember that I am addressing you as my countrymen, as Irishmen, whose characters as jurors, as gentlemen, must find either honor or degradation in the result of your decision. Small as must be the distributive share of that national estimation, that can belong to so unimportant an individual as myself, yet I do own I am tremblingly solicitous for its fate. Perhaps it appears of more value to me, because it is embarked on the same bottom with yours; perhaps the community of peril, of common safety, or common wreck, gives a consequence to my share of the risk, which I could not be vain enough to give it, if it were not raised to it by that mutuality.

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But why stoop to think at all of myself, when I know that you, gentlemen of the jury, and our country itself are my clients on this day, and must abide the alternative of honor or of infamy, as you shall decide. But I will not despond; I will not dare to despond. I have every trust, and hope, and confidence in you. And to that hope I will add my most fervent prayer to the God of all truth and justice, so to raise, and enlighten, and fortify your minds, that you may so decide, as to preserve to yourselves while you live, the most delightful of all recollections—that of acting justly; and to transmit to your children the most precious of all inheritances—the memory of your virtue.

Mr. Hoare also made an eloquent speech in behalf of the plaintiff.

Once in his argument he referred to Lord Headfort as “this hoary veteran, in whom, like Etna, the snow above did not quench the flames below.”

He said further in the course of his address:

“The noble lord proceeded to the completion of his diabolical project, not with the rash precipitancy of youth, but with the most cool and deliberate consideration. The Cornish plunderer, intent on spoil, callous to every touch of humanity, shrouded in darkness, holds out false lights to the tempest-tossed vessel, and lures her and her pilot to that shore upon which she must be lost forever, the rock unseen, the ruffian invisible, and nothing apparent but the treacherous signal of security and repose.

“So this prop of the throne, this pillar of the state, this

stay of religion, the ornament of the peerage, this common protector of the people's privileges and of the crown's prerogatives, descends from these high grounds of character to muffle himself in the gloom of his own base and dark designs, to play before the eyes of the deluded wife and the deceived husband the falsest lights of love to the one, and of friendly and hospitable regards to the other, until she is at length dashed upon that hard bosom, where her honor and happiness are wrecked and lost.

"The agonized husband beholds the ruin with those sensations of misery and of horror which you can better feel than I describe; she, upon whom he had embarked all his hopes and all his happiness in life, the treasure of all his earthly felicities, the rich fund of all his hoarded joys, sunk before his eyes into an abyss of infamy; or, if any fragment escape, escaping to solace, to gratify, to enrich her vile destroyer."

At the conclusion of the argument the court instructed the jury. The jury deliberated twelve hours and at midnight returned a verdict in favor of the plaintiff for £10,000.

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6211
S46c
v.3

